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IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Constitutional and statutory provisions involved	2
Statement of the case	3
A. The Eskimos' Interests and the Trespasses	3
B. The Alaska Native Claims Settlement Act	7
C. Proceedings Below	8
Reasons for issuing the writ	11
I. The Decision of the Court of Appeals Shifts an Enormous, Indeterminate Liability for Pre-ANCSA Trespasses From the Oil Companies to the United States Despite the Contrary Intent of ANCSA	11
A. The Eskimos' accrued causes of action are constitutionally protected rights that may not be taken without just compensation	12
B. Congress drafted ANCSA to preserve constitutionally protected rights and specifically intended that ANCSA preserve accrued tort causes of action	15
C. The decision of the Ninth Circuit will result either in a tremendous liability against the United States Treasury or a situation in which the Alaska Native Claims Settlement Act is unconstitutional—both results that Congress clearly intended to avoid in enacting ANCSA	21

INDEX—Continued

Page

II. The Decision of the Ninth Circuit is of Great Importance to the Arctic Slope Eskimos and Other Alaska Natives 23

III. This Court Should Grant Certiorari to Resolve the Division of Opinion in the Lower Courts..... 24

Conclusion 24

CITATIONS

Cases: Page

Alaska v. *Udall*, 420 F.2d 938, (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970) 4
Angle v. *Chicago, St. Paul, M. & O. R.R.*, 151 U.S. 1 (1893) 14
Cherokee Nation v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831) 12
Chilkat Tribe of Indians v. *Moose Valley Lumber Co.*, No. A77-160 (D. Ak., filed Aug. 4, 1977) 23
Cincinnati v. *Louisville & N. R.R.*, 223 U.S. 390 (1912) 14
Cochran Coal v. *Municipal Management Co.*, 380 Pa. 397, 110 A.2d 345 (1955) 14
Coombs v. *Getz*, 285 U.S. 434 (1932) 14
Crowell v. *Benson*, 285 U.S. 22 (1932) 22
Edwardsen v. *Morton*, 369 F.Supp. 1359 (D. D.C. 1973) 1, 8, 9, 13, 24
Ettor v. *City of Tacoma*, 228 U.S. 148 (1913) 14
Farbwerke, Vormals, Meister, Lucius & Bruning v. *The Chemical Foundation, Inc.*, 39 F.2d 366 (3d Cir. 1930), *aff'd* 283 U.S. 152 (1931) 14
Fort Worth v. *Dietert*, 271 S.W.2d 299 (Tex. Civ. App. 1954) 15
Gibbes v. *Zimmerman*, 290 U.S. 326 (1933) 14
Gottschalk v. *Andrus*, No. A77-146 (D. Ak., filed July 18, 1977) 23
Heckman v. *Sutter*, 119 F. 83 (9th Cir. 1902), *aff'd on rehearing*, 128 F. 393 (1904) 13
Inupiat Community of the Arctic Slope v. *United States*, No. 596-77 (Ct. Cl., filed Dec. 16, 1977) .. 10
Johnson v. *Pacific Coast S.S. Co.*, 2 Alas. Rpts. 224 (D. Ak. 1904) 13
Keil v. *Chartiers Val. Gas Co.*, 131 Pa. 466, 19 A. 78 (1890) 14
Marsh v. *Brooks*, 49 U.S. (18 How.) 223 (1850) 12, 13
Menominee Tribe of Indians v. *United States*, 391 U.S. 404 (1968) 22
Mitchell v. *United States*, 34 U.S. (9 Pet.) 711 (1835) 4

CITATIONS—Continued

Page

Monongahela Nav. Co. v. *United States*, 148 U.S. 312 (1893) 15
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 (1974) 4, 12
Oneida Indian Nation v. *County of Oneida*, 434 F.Supp. 527 (N.D. N.Y. 1977) 13
Osborn v. *Nicholson*, 80 U.S. (13 Wall.) 654 (1870) 14
Pacific M. S.S. v. *Joliffe*, 69 U.S. (2 Wall.) 450 (1865) 14
Pritchard v. *Norton*, 106 U.S. 124 (1882) 14
Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 15
Shevaliar v. *Postal Telegraph Co.*, 22 Pa. Super. 506 (1903) 14
Tee-Hit-Ton Indians v. *United States*, 348 U.S. 272 (1955) 12
Terhune v. *Gorham*, 225 Ky. 249, 8 S.W.2d 431 (1928) 15
Texas Pipeline Co. v. *Ennis*, 57 S.W.2d 178 (Tex. Civ. App. 1933), *rev'd on other grounds*, 127 Tex. 470, 93 S.W.2d 148 (1933) 15
Tuttle v. *State*, 138 Misc. 1, 244 N.Y.S. 553 (1930) .. 15
United States v. *Acoma Oil Corp.*, No. A77-254 (D. Ak. filed Dec. 16, 1977) 23
United States v. *Alcea Band of Tillamooks*, 329 U.S. 40 (1946) 12
United States v. *Berrigan*, 2 Alas. Rpts. 441 (D. Ak. 1905) 13
United States v. *Cadzow*, 5 Alas. Rpts. 125 (D. Ak. 1914) 13
United States v. *Atlantic Richfield Co., et al.*, 435 F. Supp. 1009 (D. Ak. 1977) 1, 7
United States v. *Atlantic Richfield, et al.*, Nos. 77-3234 and 77-3972 (9th Cir., opinion filed Jan. 4, 1980) 1, 11, 23
United States v. *Santa Fe Pacific R.R.*, 314 U.S. 339 (1941) 12

CITATIONS—Continued

Page

United States v. *Schnabel Lumber Co.*, No. A77-256 (D. Ak., filed Dec. 16, 1977) 23
United States v. *South-Central Timber Dev., Inc.*, No. A77-253, (D. Ak., filed Dec. 16, 1977) 23
United States v. *Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976) 13
Wehrum v. *Lincolnwood*, 91 Ill. App. 2d 418, 235 N.E.2d 343 (1968) 14

Constitution, Treaties, Executive Orders and Statutes:

United States Constitution, Amendment V 2
Act of May 17, 1884, ch. 53, 23 Stat. 24 13
Act of March 3, 1891, ch. 561, 26 Stat. 1095 13
Act of June 6, 1900, ch. 786, 31 Stat. 321 13
Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 ..... 2-3, 8, 9
Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, 48 U.S.C. note prec. § 21 ..... 4, 13
Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 25 U.S.C. §§ 1701-1712 16
28 U.S.C. § 1254(1) 10
28 U.S.C. § 1331 10
28 U.S.C. § 1362 10

Congressional Material:

117 Cong. Rec. 36851 (1971) 17, 21
117 Cong. Rec. 37092 (1971) 16
117 Cong. Rec. 38433 (1971) 20
Amendment No. 221 to S. 1830 and S. 3041, 91st Cong., 1st Sess. (1969) 18
Hearings on Amendments to Alaska Native Claims Settlement Act Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., pt. 1 (1975) 18
Hearings on H.R. 11213, H.R. 15049 and H.R. 17129, Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968) 16

CITATIONS—Continued

Page

Hearings on H.R. 3100, H.R. 7039 and H.R. 7432, Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 92nd Cong., 1st Sess. (1971) 16, 17
Hearings on S. 2906 and Related Bills Before the Senate Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968) 16
Hearings on the Status of the Proposed Trans-Alaska Pipeline Before the Senate Comm. on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969) 6
H.R. Rep. No. 92-523, 92d Cong., 1st Sess. (1971) .. 16, 17, 21
H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. (1978) 16
S. 1830, 91st Cong., 2d Sess. (1970) 18
S. Rep. No. 91-925, 91st Cong., 2d Sess. (1970) 18, 19
S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971) 5, 9, 16, 17, 19, 21
S. Rep. No. 92-581, 92d Cong., 1st Sess. (1971) 22
S. Rep. No. 95-972, 95th Cong., 2d Sess. (1978) 16

Miscellaneous:

P.L.O. 4582, 34 Fed. Reg. 1025 (1969) 5
F. Cohen, *Handbook of Federal Indian Law* (G.P.O. 1945) 13

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Inupiat Community of the Arctic Slope petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in *United States* v. *Atlantic Richfield, et al.*, Nos. 77-3234 and 77-3972 (9th Cir., filed Jan. 4, 1980).

OPINIONS BELOW

The opinion of the Court of Appeals (App. at 1-15) is not reported. The opinion of the district court (App. at 16-58) is reported at 435 F.Supp. 1009 (D. Ak. 1977). The opinion in the related case of *Edwardsen* v. *Morton* (App. at 59-100) is reported at 369 F.Supp. 1359 (D.D.C. 1973).

JURISDICTION

The judgment of the Court of Appeals (App. at 101-102) was entered on January 4, 1980. On March 24, 1980, Justice Rehnquist granted the application of the Inupiat Community of the Arctic Slope for an extension of time and extended the time for filing this petition for certiorari to and including May 2, 1980.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether Congress, in the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627, intended to take accrued trespass claims of Alaska Natives and thereby transfer liability for such trespasses from the trespassers to the United States?

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment V:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Alaska Native Claims Settlement Act § 4, 43 U.S.C. § 1603:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

STATEMENT OF THE CASE

This is a trespass action brought by the United States for the Inupiat Eskimos as their trustee and for itself as sovereign. The Inupiat Community of the Arctic Slope, the recognized tribal representative of the Inupiat Eskimos, intervened as a co-plaintiff. Both the United States' and the Eskimos' complaints seek damages for trespasses to the Eskimos' lands occurring before termination of the Eskimos' common law and statutory rights to exclusive possession of the land by the Alaska Native Claims Settlement Act of 1971, 43 U.S.C. §§ 1601-1627.

A. The Eskimos' Interests and the Trespasses.

For thousands of years, the Eskimos have used and occupied the lands of the Arctic Slope in Alaska. This use and occupancy gave rise, under settled federal common law, to a right of possession that could be terminated by the sovereign without compensa-

tion but which, until terminated, was "as sacred as the fee-simple of the whites." *Mitchel* v. *United States*, 34 U.S. (9 Pet.) 711, 746 (1835); *accord*, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668-69 (1974). In particular, trespasses on the Eskimos' lands gave rise to tort causes of action enforceable in the same manner as any other cause of action. *See* pp. 12-13 *infra*. The Eskimos' possessory rights to the land were further guaranteed by federal statute, and violations of those statutory rights also gave rise to rights of action for trespass. *See* p. 13 *infra*.

The Eskimos' undisturbed enjoyment of their land continued for longer than most Alaska Natives. The Arctic Slope is a remote area in the most northern part of Alaska, lying between the Brooks Range and the Arctic Ocean. Until 1968, there was virtually no non-Native activity in this area. In the mid-1960's, however, the State of Alaska began making selections of land under color of the Alaska Statehood Act and issuing conditional oil and gas leases [1] on "tentatively approved" selection in the Arctic Slope region. Because land held by the Natives was expressly excluded from selection,[2] the Eskimos and the Bureau

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[1] Because the leases were issued on lands that had not been patented to the State of Alaska but rather had only been "tentatively approved" by the United States, the leases were granted "without warranty" and with the proviso that even if the State's title was not valid, lease payments made would not be refunded. State Lease Form DL-1, ¶ 37.

[2] Alaska Statehood Act of July 7, 1958, Pub. L. 85-508, 72 Stat. 339, §§ 4, 6 (1958), 48 U.S.C. note prec. § 21; see *Alaska* v. *Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970).

of Indian Affairs protested Alaska's actions.[3] The Eskimos also notified oil companies conducting exploration activities that any entry on the lands would be trespassory.[4]

In November, 1966, in response to the Native protests, the Secretary of Interior suspended all tentative approvals of Alaska's land selections and all federal leasing in Alaska.[5] This restraint on development of land in Alaska immediately created pressure for a land settlement with the Natives, and lobbying began on the Alaska Native Claims Settlement Act.

Although the oil companies were put on notice by the Department of Interior's land freeze and the Eskimos' letters that their presence on the Arctic Slope was trespassory, oil exploration continued apace, both under color of conditional state leases and without any authorization whatsoever. In February 1968, Atlantic Richfield struck oil at its Prudhoe Bay State No. 1 well, and the stream of exploration became a flood.

> Within the space of a few months, oil explorations uprooted and destroyed the wilderness character of an area larger than Massachusetts. By January 1969, more than a dozen companies holding exploration leases were in a mad scram-

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[3] The history of the protests is discussed in S. Rep. No. 92-405, 92d Cong., 1st Sess. 96-97 (1971).

[4] *See, e.g.*, letter of April 13, 1965, to Atlantic Refining Company, attached as Exhibit A to the opening brief of the Eskimos in the trial court.

[5] The suspension is described in S. Rep. No. 92-405, 92d Cong., 1st Sess. 97 (1971); *see also* P.L.O. 4582, 34 Fed. Reg. 1025 (1969), extending the land freeze.

ble for a piece of the action, jockeying for position in haste and secrecy, driven by sheer compulsion as well as need. Seismic crews roamed the area in amphibious vehicles drilling the subsurface and testing it with explosives.[6]

In preparation for the present case, the United States investigated the trespasses and determined that there was credible evidence of substantial damage to the Inupiat Eskimos. The complaint of the United States, based upon its preliminary investigation, alleges that the damages caused by the trespassers included, but were not limited to:

(a) Removing vast quantities of sand and gravel;

(b) Disturbing migratory or feeding patterns of sea mammals, fish, and game to the detriment of Eskimo hunting and fishing;

(c) Damaging physical properties such as buildings, campsites, hunting and trapping grounds, cellars and caches;

(d) Killing game animals to the significant detriment of the Eskimos;

(e) Constructing airfields, buildings, roads, living units, drilling pads, and other structures,

(f) Damaging Eskimo graveyards and consecrated areas;

(g) Extracting quantities of oil and gas; and

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[6] Frome, "Hickel and the Arctic," *Field and Stream* (Nov. 1969), quoted in *Hearings on the Status of the Proposed Trans-Alaska Pipeline Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess., pt. 2, p. 275 (1969).

(h) Obtaining geophysical information of great value.

United States Complaint, ¶ X, pp. 6-7.[7]

Discovery in this case has been stayed pending resolution of the defendants' motion to dismiss. The Eskimos believe that after full discovery the evidence will show trespass damages in excess of $500 million.

B. The Alaska Native Claims Settlement Act.

Even as the trespasses continued, the oil companies recognized that their future rights to develop the land were in serious question because of the Eskimos' unextinguished rights to possession of the land.

The cloud on development of Prudhoe Bay and the freeze on any approval of Alaska's land selections intensified the efforts toward passage of an act to settle the land dispute, and in 1971 Congress passed

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[7] The United States claims damages in this case for entries to land aboriginally used and occupied by the Arctic Slope Eskimos where: (1) the entry was unauthorized; (2) the entry and trespass were under color of the Alaska Statehood Act of 1958, 72 Stat. 339, but in violation of the explicit terms contained therein which affirmatively protected Native rights; or (3) the entry was made under federal authorization but the entry interfered with substantial and notorious Native use resulting in destruction of Native possessions, such as homes, hunting or trapping grounds, and other physical structures. *See* United States Complaint, Record at 1-8; *United States* v. *Atlantic Richfield Co., et al.*, App. at 16-17 n.2, 435 F. Supp. 1009, 1014 n.2 (D. Ak. 1977).

The Inupiat Community of the Arctic Slope claims damages for all entries on the Arctic Slope prior to the enactment of the Alaska Native Claims Settlement Act on December 18, 1971. *See* Inupiat Community Complaint, Record at 18-24; *United States* v. *Atlantic Richfield Co., et al.*, App. at 16-17 n.2, 435 F. Supp. 1009, 1104 n.2 (D. Ak. 1977).

the Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601-1627 ("ANCSA"). ANCSA's purpose and effect was to open Alaska to future development and to validate the clouded land titles of non-Natives.[8]

C. Proceedings Below.

Before passage of the Alaska Native Claims Settlement Act, the Eskimos had filed an action in the United States District Court for the District of Columbia, seeking injunctive relief and a declaration that Alaska's land selections under the Alaska Statehood Act were void. *Edwardsen* v. *Morton*, Civ. No. 2014-71 (D.D.C., complaint filed October 5, 1971). This action, which threatened to halt all development and to require renegotiation of the Prudhoe Bay leases, was one of the factors that prompted ANCSA's passage.

After ANCSA's enactment, the Eskimos amended their complaint in *Edwardsen* to seek, in addition to a declaration that Alaska's pre-ANCSA land selections were void, an accounting for funds received by the United States from trespassers on the Eskimos' lands.

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[8] Section 4 of the ANCSA, 43 U.S.C. § 1603, "Declaration of Settlement," accomplishes this purpose in three subsections that constitute an integral scheme for removing the cloud of Native title claims to Alaska's lands: Subsection 4(a) prevents future challenges to pre-ANCSA oil leases and certain other land conveyances on the grounds that such conveyances had been made in derogation of aboriginal title and were therefore void; subsection 4(b) gave the United States clear title to the remaining land by terminating all aboriginal titles, thus allowing unclouded future conveyances to the State; and subsection 4(c) bars all challenges to and claims for compensation for the termination of Native possessory rights.

The United States moved for summary judgment on all elements of the Eskimos' *Edwardsen* complaint, arguing (1) that ANCSA extinguished all of the Eskimos' present claims to land and validated previously void titles; and (2) that the Eskimos were not entitled to any trespass accounting because ANCSA extinguished all causes of action for pre-ANCSA trespasses.

Judge Oliver Gasch granted the United States' motion regarding the title claim, holding that ANCSA had terminated present Native title and validated previously void non-Native titles. *Edwardsen* v. *Morton*, App. at 90-92, 369 F. Supp. 1359, 1377-78 (D.D.C. 1973).

The court held, however, that summary judgment could not be granted on the trespass issue. Causes of action arising out of the trespasses were not extinguished by Section 4 of ANCSA. App. at 94-96; 369 F. Supp. at 1379. Congress, the judge found, specifically stated in S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971)—the authoritative explanation of ANCSA's extinguishment provisions—that tort claims, which would include the Eskimos' trespass causes of action, had not been extinguished. Moreover, a different construction of Section 4 would create constitutional infirmities in ANCSA because the Eskimos' tort claims were vested property rights protected by the Fifth Amendment, which could not be taken without just compensation. Accordingly, Judge Gasch ruled that ANCSA could not be construed as taking the Eskimos' accrued trespass causes of action. *Ibid.*

The United States and the Eskimos thereupon entered into an agreement for prosecution of the

pre-ANCSA trespassers on Eskimo lands. The instant case, the embodiment of that agreement, was filed by the United States on October 7, 1975. The Inupiat Community of the Arctic Slope intervened and filed a complaint on March 10, 1976. Jurisdiction over the claims of the United States is founded on 28 U.S.C. § 1345. Jurisdiction over the claims of the Inupiat Community is founded on 28 U.S.C. §§ 1331 and 1362.

In the district court, the defendants moved to dismiss on a number of grounds, including a claim that ANCSA took the Eskimos' accrued causes of action for trespass. The District Judge, Judge Fitzgerald, granted the defendants' motions and ordered the complaints dismissed on the ground that ANCSA had extinguished the Eskimos' and the United States' accrued causes of action.

After Judge Fitzgerald's decision, the Eskimos were forced by statute of limitations considerations to file suit against the United States for just compensation for the taking of their accrued causes of action. *Inupiat Community of the Arctic Slope* v. *United States*, No. 596-77 (Ct. Cl., filed Dec. 16, 1977). That action is presently stayed pending resolution of this proceeding in which the United States and the Eskimos are attempting to collect the trespass damages from the actual trespassers.

On appeal from Judge Fitzgerald's decision, the Ninth Circuit affirmed. It held that ANCSA did take the Eskimos' causes of action and, recognizing the possibility that this taking would render the United States liable for compensation for that taking, stated:

> Our disposition of this case makes it unnecessary for us to decide . . . whether or not Congress gave just compensation for the package of various Native properties and interests it took and extinguished by giving the Natives 40 million acres of land and nearly a billion dollars; and . . . whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States. Perhaps these questions will be decided in *Inupiat Community of the Arctic Slope* v. *United States*, No. 596-77 (Ct. Cl., filed Dec. 16, 1977). *We note that if they are decided favorably to the Inupiats there, the Inupiats might recover as just compensation from the United States the same amount that they could have recovered from the trespassing private defendants in the absence of the Act.*

App. at 15, slip op. at 13 (emphasis added).

REASONS FOR ISSUING THE WRIT

Three reasons require the issuance of a writ of certiorari to review the decision of the Ninth Circuit: (1) the potential impact of the decision on the United States Treasury and on the intent and constitutionality of ANCSA; (2) the importance of this case to Alaska Natives; and (3) the need to resolve a conflict of opinion among lower federal courts.

I. The Decision of the Court of Appeals Shifts an Enormous, Indeterminate Liability for Pre-ANCSA Trespasses from the Oil Companies to the United States Despite the Contrary Intent of ANCSA.

The Eskimos' accrued trespass causes of action are constitutionally protected rights that may not be taken without payment of just compensation. Part A

infra. Congress carefully drafted ANCSA to avoid taking any protected rights and thus to avoid subjecting the United States to liability of indeterminate magnitude. Part B *infra.*

The Ninth Circuit's decision that Section 4 of ANCSA effected a taking of the Eskimos' trespass causes of action is an error in statutory construction of major signifiance. Under that decision, either the United States' Treasury is liable for the oil companies' trespasses or ANCSA is unconstitutional because it takes property without just compensation. Part C, *infra.*

A. *The Eskimos' Accrued Causes of Action Are Constitutionally Protected Rights That May Not Be Taken Without Just Compensation.*

Aboriginal or "Indian" title, such as that held by the Eskimos before ANCSA's passage, is an absolute right to exclusive possession of land.[9] Like a tenancy at will, the Indian right to exclusive possession may be terminated by Congress without just compensation,[10] but until terminated by the sovereign, aboriginal land rights are "as sacred as the fee-simple, absolute title of the whites." *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831); *accord*, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668-69 (1974). The oil company trespassers'

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[9] *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668-69 (1974); *United States* v. *Santa Fe Pacific R.R.*, 314 U.S. 339, 345 (1941); *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40, 46 (1946); *Marsh* v. *Brooks*, 49 U.S. (8 How.) 223, 232 (1850).

[10] *See Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 279 (1955).

violation of the Eskimos' common law aboriginal title rights gave rise to accrued causes of action for trespass identical to the causes of action held by any landholder whose possessory rights are violated.[11]

In addition to their common law aboriginal title, the Eskimos held federal statutory rights to exclusive possession of the Arctic Slope lands they used and occupied.[12] As with their common law possessory rights, violations of the Eskimos' statutory possessory rights gave rise to accrued trespass causes of action.[13]

An accrued cause of action for trespass is constitutionally protected. Thus, while Congress affects no constitutionally protected rights when it prospectively terminates a common law or statutory right, as when it terminates a tenancy at will or aboriginal title, a cause of action for violation of such rights

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[11] *See, e.g., United States* v. *Southern Pacific Transp. Co.*, 543 F.2d 676 (9th Cir. 1976); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527 (N.D.N.Y. 1977); *Edwardsen* v. *Morton*, 369 F. Supp. 1359, 1371 (D.D.C. 1973); *see also Marsh* v. *Brooks*, 49 U.S. (18 How.) 223, 232 (1850) (ejectment); F. Cohen, *Handbook of Federal Indian Law*, 306, 311 (G.P.O. 1945).

[12] Act of May 17, 1884, ch. 53, 23 Stat. 24, § 8; Act of March 3, 1891, ch. 561, 26 Stat. 1095, § 14; Act of June 6, 1900, ch. 786, 31 Stat. 321, § 27; Alaska Statehood Act of July 7, 1958, Pub. L. No. 85-508, 72 Stat. 339, § 4, 48 U.S.C. note prec. § 21.

[13] See, e.g., *Heckman* v. *Sutter*, 119 F. 83 (9th Cir. 1902), *aff'd on rehearing*, 128 F. 393 (1904); *United States* v. *Berrigan*, 2 Alas. Rpts. 442 (D. Ak. 1905); *Johnson* v. *Pacific Coast S.S. Co.*, 2 Alas. Rpts. 224 (D. Ak. 1904); *United States* v. *Cadzow*, 5 Alas. Rpts. 125 (D. Ak. 1914).

accruing before termination of the right cannot be taken without due process and just compensation.

> A right of action to recover damages for an injury is property, and has a legislature the power to destroy such property? An executive may pardon and thus relieve a wrongdoer from the punishment the public exacts for the wrong, but neither executive nor legislature can pardon a private wrong or relieve the wrongdoer from civil liability to the individual he has wronged.

Angle v. *Chicago, St. Paul, M. & O. R.R.*, 151 U.S. 1, 19 (1893).[14]

Because accrued trespass claims are constitutionally protected even when there is a subsequent complete taking of the underlying title to land by the government, causes of action for prior trespasses to possession remain in existence unless the trespass damages are litigated in the condemnation proceedings and expressly provided for in the condemnation award.[15]

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[14] *Accord, Coombs* v. *Getz*, 285 U.S. 434, 442 (1932); *Gibbes* v. *Zimmerman*, 290 U.S. 326, 332 (1933); *Ettor* v. *City of Tacoma*, 228 U.S. 148, 156 (1913); *Cincinnati* v. *Louisville & N. R.R.*, 223 U.S. 390, 400 (1912); *Pritchard* v. *Norton*, 106 U.S. 124, 132 (1882); *Osborn* v. *Nicholson*, 80 U.S. (13 Wall.) 654 (1870); *Pacific M. S.S.* v. *Joliffe*, 69 U.S. (2 Wall.) 450 (1865); *Farbwerke, Vormals, Meister, Lucius & Bruning* v. *The Chemical Foundation, Inc.*, 39 F.2d 366, 371 (3d Cir. 1930), *aff'd*, 283 U.S. 152 (1931).

[15] *See, e.g., Wehrum* v. *Lincolnwood*, 91 Ill. App.2d 418, 235 N.E.2d 343 (1968); *Cochran Coal* v. *Municipal Management Co.*, 380 Pa. 397, 110 A.2d 345 (1955), *citing wtih approval Shevalier* v. *Postal Telegraph Co.*, 22 Pa. Super. 506 (1903), and *Keil* v. *Chartiers Val. Gas Co.*, 131 Pa. 466, 19 A. 78, 79

As Judge Gasch explicitly held in *Edwardsen* v. *Morton*, and as the Ninth Circuit implicitly recognized below, the Fifth Amendment protects the Eskimos' accrued causes of action for trespasses occurring prior to ANCSA's termination of their exclusive possessory rights to the Arctic Slope. Those protected rights cannot be taken without just compensation.

B. *Congress Drafted ANCSA to Preserve Constitutionally Protected Rights and Specifically Intended That ANCSA Preserve Accrued Tort Causes of Action.*

When constitutionally protected property is taken by legislative action, just compensation is required, and the courts, not Congress, determine the amount to be paid.[16] When Congress takes protected rights, the determination of just compensation is often subject to a great deal of delay and uncertainty owing to the factual and legal complexities of such proceedings in the Court of Claims. By contrast, the termination of constitutionally unprotected rights can be accomplished quickly and with certainty because Congress, and Congress alone, can determine what, if any, compensation is proper.

Congress deliberately drafted ANCSA to avoid taking any protected rights and thus to avoid the

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(1890); *Tuttle* v. *State*, 138 Misc. 1, 244 N.Y.S. 553 (1930); *Terhune* v. *Gorham*, 225 Ky. 249, 8 S.W.2d 431 (1928); *Fort Worth* v. *Dietert*, 271 S.W.2d 299 (Tex. Civ. App. 1954); *Texas Pipeline Co.* v. *Ennis*, 57 S.W.2d 178 (Tex. Civ. App. 1933), *rev'd on other grounds*, 127 Tex. 470, 93 S.W.2d 148 (1933).

[16] *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 n.39 (1974); *Monongahela Nav. Co.* v. *United States*, 148 U.S. 312, 327 (1893).

judicial scrutiny, delay, and indeterminate federal liability that such a taking would involve.[17] In considering several early legislative proposals that would result in potential suits in the Court of Claims, Congress rejected the proposals: (1) to avoid the lengthy litigation against the United States and the uncertainty that would result,[18] (2) to avoid judicial scrutiny as to the amount of compensation to be awarded the Natives;[19] and (3) to avoid the federal liability of indeterminate magnitude that any taking of protected rights would create.[20]

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[17] In the recently enacted Rhode Island Indian Claims Settlement Act, Pub. L. No. 95-395, 25 U.S.C. §§ 1701-1712, Congress again carefully distinguished between unprotected Indian rights such as unrecognized aboriginal title and protected rights such as claims for trespass to aboriginal title. *See* S. Rep. No. 95-972, 95th Cong., 2d Sess. 9, 13 (1978); H.R. Rep. No. 95-1453, 95th Cong., 2d Sess. 9, 12-13 (1978).

[18] *See, e.g., Hearings on S. 2906 and Related Bills Before the Senate Comm. on Interior and Insular Affairs,* 90th Cong., 2d Sess. 25, 27 (1968) (*"1968 Senate Hearings"*) (Cong. Pollock); 117 Cong. Rec. 37092 (1971) (Cong. Taylor). *See also* S. Rep. No. 92-405, 92nd Cong., 1st Sess. 78 n.9 (1971); 1968 *Senate Hearings* at 537 (Sec'y of Interior Udall); *Hearings on H.R. 11213, H.R. 15049 and H.R. 17129, Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs,* 90th Cong., 2d Sess. 116 (1968) (Cong. Meeds); H.R. Rep. No. 92-523, 92nd Cong., 1st Sess. 4 (1971).

[19] *See, e.g.,* H.R. Rep. No. 92-523, 92nd Cong., 1st Sess. 4 (1971); S. Rep. No. 92-405, 92nd Cong., 1st Sess. 77-78 (1971); *Hearings on H.R. 3100, H.R. 7039, and H.R. 7432, Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs,* 92nd Cong., 1st Sess. 65, 66 (1971) (*"1971 House Hearings"*) (Cong. Aspinall).

[20] *See, e.g., 1971 House Hearings, supra* note 19, at 54-66 (Cong. Aspinall).

In adopting the final terms of ANCSA, members of Congress emphasized that no protected rights were to be taken, and thus the unacceptable consequences of such a taking would be avoided.

> [T]here should be no misunderstanding about the fact that Congress has the sole power and responsibility for determining what is fair compensation for the extinguishment of aboriginal title . . . . It is settled law that aboriginal title is not compensable under the due process clause of the fifth amendment, and that Congress can extiniguish an aboriginal title without paying anything if it wishes to do so.[21]

Accordingly, Congress did not need to calculate the value of the rights extinguished:

> The $925,000,000 figure is an arbitrary one. It is not intended to be related to the value of the lands claimed by the Natives under the doctrine of aboriginal title.
>
> . . . .
>
> [I]t is based on the following considerations: the extreme poverty and underprivileged status of the Natives generally, and the need for adequate resources to permit the Natives to help themselves economically.

H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 5-6 (1971). *See also S. Rep. No. 92-405*, 92d Cong., 1st Sess. 82 (1971); 117 Cong. Rec. 36851 (1971).

As the State of Alaska later stated: "We believe that Congress could not and did not intend . . . [to] reach constitutionally protected rights of action."

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[21] *Id.* at 65 (Cong. Aspinall).

Hearings on Amendments to Alaska Native Claims Settlement Act Before the Senate Comm. on Interior and Insular Affairs, 94th Cong., 1st Sess., pt. 1, p. 75 (1975).

From the start of ANCSA's legislative development, the Act was explicitly limited to the termination of present Native possessory rights and the removal of clouds on previously void non-Native land title—thus preserving (not taking) accrued trespass claims.[22]

Although the wording of settlement bills changed over the course of time, no legislative history suggests that Congress ever decided to take the Natives' accrued causes of action for trespass. In the report on the final Senate version of ANCSA, a report that the Court of Appeals dismissed as a "hasty mistake," the Senate Interior Committee carefully explained that:

> [The extinguishment provision] declares that the provisions of this Act constitute a full and final extinguishment of any and all claims based upon aboriginal right, title, use or occupancy of land in Alaska. The language specifically includes submerged lands and any aboriginal hunting and fishing rights. The extingiushment [sic] is final and effective not only for claims against the United States but also for any claims against the State of Alaska and all other persons. *Remaining in effect and unextinguished by this Act are all claims which are based upon*

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[22] *See, e.g.*, Amendment No. 221 to S. 1830 and S. 3041, 91st Cong., 1st Sess. (1969); S. 1830, 91st Cong., 2d Sess. (1970); S. Rep. No. 91-925, 91st Cong., 2d Sess. 114-15 (1970).

> *grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits* for an accounting for funds belonging to Natives or Native groups in the custody of the United States, *for tort* or breach of contract, and for violations of the fair and honorable dealings clause of the Indian Claims Commission Act.

S. Rep. No. 92-405, 92d Cong., 1st Sess. 110-11 (1971) (emphasis added). Even if the Court of Appeals were not so clearly in error in attempting to dismiss this unequivocal statement as a "hasty mistake" by drafters of the committee report,[23] this is the stated

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[23] *United States* v. *Atlantic Richfield, et al., supra,* App. at 12, slip op. at 10. Contrary to the belief of the Court of Appeals, the report clearly was not a "hasty mistake" describing the 1971 Senate bill (S. 35) in language applicable only to the 1970 Senate bill (S. 1830). The section of the report referred to explained the provisions of Section 4 of the Senate bill, "Declaration of Settlement." The report carefully explained the changes made from the 1970 bill. For example, the report explains that the 1971 bill contains a new provision for ratifying "tentative approvals pursuant to Section 6(g) of the Alaska Statehood Act." Indeed, of nine paragraphs in the report explaining the terms of the extinguishment provisions, only one paragraph describes the 1971 bill in the same terms as were used to explain the 1970 bill—the paragraph preserving claims sounding in tort or contract. *Compare* S. Rep. No. 91-925, 91st Cong., 2d Sess. 14-15 (1970) *with* S. Rep. 92-405, 92d Cong., 1st Sess. 110-11 (1971).

Senator Jackson drafted and introduced both S. 1830 and S. 35. He chaired the Senate Interior Committee that prepared the 1970 and 1971 reports explaining both bills. The theory that Senator Jackson made a major change in one of

[footnote continued]

meaning that the full Senate had before it when it voted to approve the bill. When the full Senate passed the Senate version of ANCSA, it did so with the understanding that the Act would not take the Natives' accrued trespass causes of action.

The Senate bill went to conference and the wording of the settlement provision was changed. In the Conference Report, however, the Senate was reassured that the new wording, later enacted as ANCSA, would have the same effect as the Senate bill.

> The conference report language is, in substance, the same as the language of the Senate amendment [S. 35].

S. Rep. No. 92-581, 92d Cong., 1st Sess. 40 (1971).

In sum, ANCSA was drafted to—and did—terminate present Native aboriginal land title in Alaska, and to clear the cloud from previously invalid non-Native titles. Congress explicitly intended, however, that ANCSA *not* take any protected rights, because such a taking would result in litigation against the

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his own bills and then mistakenly failed to explain it in his own committee report is simply not credible.

When S. 35 was reported out by the Senate Interior Committee with Senate Report No. 92-405, Senator Jackson told the Senate: "S. 35 is based upon the language of S. 1830 as passed by the Senate in the 91st Congress." 117 Cong. Rec. 38433 (1971). He then enumerated eight "major" changes between S. 1830 and S. 35. None of those changes included a change in the definition of Native claims to be extinguished. 117 Cong. Rec. 38433 (1971). The changes in extinguishment language between S. 1830 and S. 35 were for stylistic purposes only. Senate Report No. 92-405 was not a "mistake".

United States, judicial scrutiny of the terms of the settlement, and an indeterminate liability of potentially great magnitude against the United States Treasury.

C. *The Decision of the Ninth Circuit Will Result Either in a Tremendous Liability Against the United States Treasury or a Situation in Which the Alaska Native Claims Settlement Act is Unconstitutional—Both Results That Congress Clearly Intended to Avoid in Enacting ANCSA.*

As both Judge Gasch and the Ninth Circuit have recognized, if ANCSA took constitutionally protected causes of action, that taking is unconstitutional unless the Eskimos receive just compensation. The compensation received by the Eskimos in ANCSA was neither calculated to compensate them for their trespass causes of action [24] nor did it do so.[25] ANCSA is

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[24] Congress emphasized again and again that the numbers chosen for the settlement were "arbitrary." *See, e.g.*, H.R. Rep. No. 92-523, 92d Cong., 1st Sess. 5-6 (1971); S. Rep. No. 92-405, 92d Cong., 1st Sess. 82 (1971); 117 Cong. Rec. 36851 (1971). ANCSA's legislative history contains not a scintilla of evidence that anyone attempted to value the Natives' accrued causes of action for pre-ANCSA trespasses.

[25] Although Alaska Natives as a whole received a substantial award for termination of their aboriginal titles, the structure of the settlement distribution resulted in the Arctic Slope Eskimos receiving far less than would be necessary to compensate them if ANCSA had taken their protected trespass causes of action. Under ANCSA's terms, the Eskimos will receive only 5% of the cash settlement, an amount that is reduced substantially in value because it will be paid out over a term of years without interest, resulting in a significant discounting due to the loss of the time value of money. The

[footnote continued]

therefore unconstitutional unless the Eskimos are entitled to seek just compensation from the United States in the Court of Claims. Such a suit, with its protracted litigation and potential impact on the United States Treasury, is precisely what Congress intended to avoid. *See also Menominee Tribe of Indians* v. *United States*, 391 U.S. 404, 412-13 (1968) (statutes should not be construed so as to expose the United States to liability for taking property rights). The alternative, that the Eskimos are not entitled to seek just compensation in the Court of Claims, would result in the entire settlement being unconstitutional—a result equally contrary to the purpose of Congress and to this Court's settled principles. *See Crowell* v. *Benson*, 285 U.S. 22, 62 (1932) (statutes should be construed, whenever possible, so as to avoid constitutional infirmities).

This Court should issue a writ of certiorari in this case to avoid total frustration of the Alaska Native Claims Settlement Act.

Eskimos estimate that at present interest rates their settlement was worth less than $25 million. ANCSA also allowed the Eskimos to select 4 million acres of land, but because those selections were not permitted within the oil rich lands of the National Petroleum Reserve-Alaska, or the fertile hunting grounds of the William O. Douglas Arctic Wildlife Range, and because Alaska's selections of the oil rich Prudhoe Bay lands were confirmed by ANCSA, the Eskimos have been forced to choose lands far from their villages, with little utility for subsistence hunting and with at best speculative economic value.

Because the Act was not a fair settlement even for the Eskimos' unprotected aboriginal land titles, the Eskimos voted against Alaska Federation of Native endorsement of the bill, and, after congressional passage, sent a telegram to President Nixon urging that he veto the bill. *See* Exhibit D to the opening brief of the Eskimos in the trial court.

II. The Decision of the Ninth Circuit is of Great Importance to the Arctic Slope Eskimos and Other Alaska Natives.

The Eskimos of the Arctic Slope were the primary victims of trespassers who, in the face of explicit notice that their entries were illegal, entered Native lands and destroyed graveyards and hunting areas. Other Natives of Alaska, however, may also have been damaged by such intentional torts. There are presently pending five similar cases in which the United States and the Natives seek to recover damages from pre-ANCSA trespassers.[26] If this Court denies certiorari in this case, these plaintiffs will also be forced to seek compensation for those damages from the United States.

Additionally, ANCSA is the last great settlement between Native Americans and the United States. A definite interpretation of that Act on this important issue, the extinguishment of all trespass claims that occurred before the Act, deserves a decision by this Court.

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[26] *Chilkat Tribe of Indians* v. *Moose Valley Lumber Co.*, No. A77-160 (D. Ak., filed Aug. 4, 1977) (involving Southeastern Alaska); *United States* v. *South-Central Timber Dev., Inc.*, No. A77-253 (D. Ak., filed Dec. 16, 1977) (involving Southern Kenai Peninsula area); *United States* v. *Acoma Oil Corp.*, No. A77-254 (D. Ak., filed Dec. 16, 1977) (involving Kenai Peninsula area of Southeastern Alaska); *United States* v. *Schnable Lumber Co.*, No. A77-256 (D. Ak., filed Dec. 16, 1977) (involving Southeastern Alaska); *Gottschalk* v. *Andrus*, No. A77-146 (D. Ak., filed July 18, 1977) (involving Bristol Bay area of Western Alaska).

III. This Court Should Grant Certiorari to Resolve the Division of Opinion in the Lower Courts.

Judge Gasch has held that ANCSA did not take the Eskimos' pre-ANCSA trespass causes of action against private parties. *Edwardsen* v. *Morton*, App. at 95-96, 369 F. Supp. 1359, 1379 (D.D.C. 1973). The Court of Appeals for the Ninth Circuit has held that ANCSA did take those cases of action and thereby absolved the private trespassers from liability. Although this conflict does not necessarily prevent the Arctic Slope Eskimos from eventually recovering the full measure of their damages against the United States in the Court of Claims, it will create the possibility of conflicting findings of liability in the other suits by Alaska Natives. In light of the importance of this question to the Alaska Natives and to the United States, this Court should issue a writ of certiorari to resolve the conflict among the lower courts.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

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No. 79-1739

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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INDEX

Page

United States v. *Atlantic Richfield Co., et al.*, Nos. 77-3234 and 77-3972 (9th Cir., opinion filed January 4, 1980) 1

United States v. *Atlantic Richfield Co., et al.*, 435 F.Supp. 1009 (D. Ak. 1977) 16

Edwardson v. *Morton*, 369 F.Supp. 1359 (D. D.C. 1973) 59

United States v. *Atlantic Richfield Co., et al.*, Nos. 77-3234 and 77-3972 (9th Cir., judgment entered January 4, 1980) 101

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 77-3234

[Jan. 4, 1980]

UNITED STATES OF AMERICA,
Plaintiff,

and

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Plaintiff-Intervenor-Appellant,

vs.

ATLANTIC RICHFIELD COMPANY, *et al.*,
Defendants-Appellees.

No. 77-3972

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

and

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Plaintiff-Intervenor,

vs.

ATLANTIC RICHFIELD COMPANY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska

Before: CHOY and KENNEDY, Circuit Judges, and S. WILLIAMS,* District Judge.

CHOY, Circuit Judge:

Appellants protest the ruling of the district court that their trespass claims were extinguished by the Alaska Native Claims Settlement Act. We affirm.

I. BACKGROUND

Appelants [1] represent all the Eskimos on the North Slope of Alaska. Appellees are the State of Alaska [2] and companies involved in the effort to exploit North Slope petroleum. Until one or two decades ago the North Slope was essentially unpeopled except for a few Inupiats [3];

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* The Honorable Spencer M. Williams, United States District Judge for the Northern District of California, sitting by designation.

[1] Appellants are the United States and the Inupiat Community of the Arctic Slope. The Inupiat Community is composed of all the Eskimos on the North Slope. In Edwardsen v. Morton, 369 F. Supp. 1359 (D.D.C. 1973), essentially a suit by the Inupiats against the United States, a claim that the United States breached its fiduciary duty by authorizing the trespasses involved here survived summary judgment. The United States settled the *Edwardsen* suit by agreeing to sue the defendants here on behalf of the Inupiats. This suit resulted, and the Inupiats intervened.

This opinion will refer generally to all the Eskimos and Indians inhabiting Alaska as "Natives," and specifically to the Eskimos inhabiting the North Slope as "Inupiats."

[2] The State has a good sovereign-immunity defense.

[3] The North Slope comprises 56,500,000 acres. According to the 1970 census, only 3500 people inhabited the entire area,

more recently, there has been a mighty "oil rush." For the purposes of this appeal, we assume that the Inupiats retained unrecognized aboriginal title to the North Slope until 1971. Such title is good against third parties (we assume *arguendo*) but can be extinguished without compensation by the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

Pursuant to the Alaska Statehood Act, § 6, the state selected a large amount of oil-rich "vacant, unappropriated, and unreserved" North Slope land for its own in the 1960's. The United States tentatively approved these selections, and the state gave conditional leases to oil interests in exchange for $912,000,000. Most of the alleged trespasses were under this color of state title. We assume *arguendo* that, because of the Inupiats' aboriginal title, the selections and leases were invalid and the entries were trespasses. *Cf. Alaska* v. *Udall*, 420 F.2d 938 (9th Cir. 1969) (aboriginal rights might prevent state selection), *cert. denied*, 397 U.S. 1076 (1970). On petition of the Natives, Congress enacted the Alaska Native Claims Settlement Act, Pub. L. No. 92-203, 85 Stat. 688 (codified at 43 U.S.C. § 1601 *et seq.*) ("the Act") on December 18, 1971. Congress found and declared that "there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims," and that "the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives, without litigation." 43 U.S.C. § 1601(a), (b).

Appellants instituted this suit against the private defendants for pre-Act trespasses in the belief that the Act had not extinguished such claims. This belief found sup-

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and not all of these were Eskimos. Over 2000 lived in Barrow, and all but 124 lived in one or another of eight widely separated villages.

port in *Edwardsen* v. *Morton*, 369 F. Supp. 1359 (D.D.C. 1973), but the district court in the present case disagreed and dismissed the claims. 435 F. Supp. 1009 (D. Alas. 1977).[4]

We hold that the Act extinguished not only the aboriginal titles of all Alaska Natives, but also every claim "based on" aboriginal title in the sense that the past or present existence of aboriginal title is an element of the claim.[5] In exchange, the Natives were granted $962,500,000 and 40,000,000 acres of land in fee simple.

II. STATUTORY LANGUAGE

This case requires a construction of § 4 of the Act 43 U.S.C. § 1603, which reads:

> (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

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[4] For a more complete exposition of the background of this case, *see id.* at 1013-19.

[5] But claims not based on aboriginal title—for example, personal injury claims, claims for damage to personal property, and claims for trespass to land held in fee—were not extinguished.

> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

The parties agree, and so do we, that § 4(b) extinguished all aboriginal titles as of December 18, 1971, the date the Act was enacted.

A. *Section 4(a)*

There is disagreement over § 4(a). Appellees argue that it is retroactive, extinguishing aboriginal titles as of the dates of the prior conveyances and tentative approvals of state selections. Appellants read the subsection as being prospective only, so that in post-1971 proceedings the conveyances and selections (and leases thereunder) should be *regarded* (through legal legerdemain) as unclouded and valid today even if they were invalid when made.[6] Appellants claim that their aboriginal title was not *truly* extinguished, however, until 1971. If the Inupiats' aboriginal title was not extinguished until 1971, they arguably have a good cause of action for pre-1971 trespasses; whereas if at the times of entry the oil companies held valid leases from the holders of the valid fee, the entries were not trespassory.

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[6] The Inupiats' argument is that § 4(a), "by ratifying pre-ANCSA federal conveyances, was intended to, and did, give good present title to parties whose land titles would otherwise have been void even after the general extinguishment of aboriginal title in Alaska effected by subsection 4(b).

The district court held that § 4(a) was retroactive, and thus that the entries under federal authorization and the conditional state leases (the bulk of all the entries) were not trespasses. 435 F. Supp. at 1022-25. We agree. Both § 4(b) and § 4(c) say that Native interests are "hereby" extinguished; § 4(a) does not, suggesting that it extinguished title as of some past moment. We deem the retroactive interpretation of § 4(a) to be more logical, whereas the prospective interpretation creates a cumbersome legal fiction whose only apparent purpose is to preserve Native trespass claims which (as we hold herein) were immediately extinguished in § 4(c).

If § 4(a) accomplished anything that § 4(b) and § 4(c) did not, it was to validate the state oil leases (as between the state and its lessees) by establishing that the state had good title to lease out. A retroactive reading serves this purpose directly and well; a prospective reading conspicuously fails actually to validate the leases, but instead directs the courts to regard the leases as if they were valid. Between these two readings, the retroactive one is obviously more reasonable.

B. *Section 4(c)*

Section 4(a), as we read it, had the effect of eliminating most of appellants' trespass claims. We further hold that § 4(c) specifically extinguished *all* trespass claims.

Without doubt, § 4(c) abolished all Native claims based on the actual "taking" (extinguishment) of aboriginal title. The question presented on appeal is whether or not the district court was correct to say that § 4(c) went farther and extinguished "all claims . . . that are based on aboriginal right" in the sense that the past or present existence of aboriginal title is an element of the claims.

Several passages in the subsection clearly indicate that Congress intended to extinguish more types of claims

than merely claims for the "taking" (extinguishment) of aboriginal title. Therefore, we conclude that the district court was correct.

The subsection reads, "All claims against the United States, the State, and all other persons that are based on claims of aboriginal right . . . are hereby extinguished." Since only the United States could extinguish the Natives' aboriginal title, only the United States could be the defendant in a suit based on extinguishment of title. Yet all claims against "the State, and all other persons" were extinguished as well. In order to make the language regarding "the State, and all other persons" meaningful, there is no choice but to construe the statute to extinguish certain types of claims, "based on aboriginal right," that might be brought against the State and other persons. The quintessential action against private citizens, based on aboriginal title, is an action for wrongful invasion, use, and assertion of dominion over the property —trespass.

Moreover, such trespass claims might be brought by Natives in "state court," as § 4(c) contemplated, while claims against the United States for extinguishment of title could only be brought in federal court. Further, at the time the Act's language was drafted, no claim based on extinguishment of title was "pending" in any court, yet Congress extinguished all pending claims. Congress must have had in mind claims based on pre-1971 activities.

In short, when Congress said in §§ 2(a) and 4(c) of the Act, 43 U.S.C. §§ 1601(a), 1603(c), that it was settling "all claims," it meant just that. Congress intended to and did extinguish all Native trespass claims based on aboriginal title.

III. LEGISLATIVE HISTORY

To be sure, the strict "plain meaning rule" has been relaxed, and we may examine legislative history to help us construe even seemingly clear statutory language. *Doyon, Ltd.* v. *Bristol Bay Native Corp.*, 569 F.2d 491, 494 (9th Cir.), *cert. denied*, 439 U.S. 954 (1978). Such examination, however, does not alter our reading of § 4(c). The House report stated,

> Section 4 extinguishes all aboriginal titles in Alaska, and all claims based thereon,

and

> The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title.

H.R. Rep. No. 523, 92d Cong., 1st Sess. 6, 8, *reprinted in* [1971] U.S. Code Cong. & Ad. News 2196, 2198. The Senate report stated that the objective of the legislation was to avoid

> a myriad of lawsuits which cannot provide justice to any of the parties involved but which may be expected to increase the existing antagonisms between Native people and other Alaskans.

S. Rep. No. 405, 92d Cong., 1st Sess. 73 (1971). The Conference Committee report [7] stated,

> It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of

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[7] The House and Senate Conference Reports are identical. S. Conf. Rep. No. 581, 92d Cong., 1st Sess. (1971); H.R. Conf. Rep. No. 746, 92d Cong., 1st Sess. (1971). [Hereinafter cited Conf. Rep.]

> Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska.

Conf. Rep. 40, *reprinted in* [1971] U.S. Code Cong. & Ad. News 2253 (emphasis in original).

The statements of former Justice Arthur Goldberg, attorney for the Alaska Federation of Natives, before Congress in 1969 also support the district court's conclusion. Goldberg, under questioning by Senator Stevens of Alaska, said, "The position that the Natives have taken is that they are prepared for an extinguishment of anything that is based upon aboriginal title." *Alaska Native Land Claims: Hearings on S. 1830 Before the Senate Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 300-01 (1969). And Goldberg painstakingly informed Congressman Pollock of Alaska that the Natives would be unable to assert claims against private parties for pre-extinguishment trespasses, and that he said this just after conferring about it "with all of the Native representatives who are here and all their regional counsel." *Alaska Native Land Claims: Hearings on H.R. 13142 and 10193 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 91st Cong., 1st Sess. 267 (1969). While these statements do not estop the Inupiats or other Natives, they do suggest what Congress meant by the language it enacted into law.

Indeed, in view of the repeated statements in the legislative history that the statute should be "broadly" applied to extinguish "all claims," and in view of Congress' knowledge of the Natives' trespass claims, it would be incomprehensible to us if Congress did not intend to extinguish the trespass claims, along with all other claims based on aboriginal title, when it gave the Natives over

60,000 square miles of fee simple land and almost a billion dollars.[8]

The Inupiats' only support from the legislative history is the following passage from S. Rep. No. 405, 92d Cong., 1st Sess. 110-11 (1971):

> Subsection 4(a) [§ 4(c) of the Act as passed] declares that the provisions of this Act constitute a full and final extinguishment of any and all claims based upon aboriginal right, title, use or occupancy of land in Alaska. The language specifically includes submerged lands and any aboriginal hunting and fishing rights. The extinguishment is final and effective not only for claims against the United States but also for any claims against the State of Alaska and all other persons. Remaining in effect and unextinguished by this Act are all claims which are based upon grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits for an accounting for funds belonging to Natives or Native groups in the custody of the United States, for tort or breach of contract, and for violations of the fair and honorable dealings clause of the Indian Claims Commission Act. Specifically included, and dismissed and extinguished under the terms of this Act, are all claims pending before the Indian Claims Commission and any court, Federal or State, which are based upon a claim of aboriginal right, title, use or occupancy.

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[8] Congress was aware that under *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), it was not obligated to give the Natives any compensation at all for the taking of aboriginal title. While Congress, as a matter of grace, surely intended a substantial part of the large settlement to be in exchange for the taking of title, we cannot but wonder if the settlement would have been so large if Congress did not believe it was also taking something for which it had to pay.

However, this language does not persuade us that Congress, or even the Senate, meant to preserve the Natives' trespass claims, for the following reasons:

(1) True, the report language preserves suits "for tort," and trespass is a tort. However, we think that the Senate's meaning, as indicated by the three other kinds of action it specifically preserved and by the legislative history generally, was that all kinds of civil action were preserved if they were not based in any way on aboriginal title. Thus, such "tort" actions as those based on personal injury or damage to personal property would not be extinguished. The passage is no better than ambiguous on the issue of whether or not trespass actions based on aboriginal title were to be preserved.

(2) The report language preserves "all claims which are based upon grounds other than the loss of original Indian title land." But appellees correctly point out that this paragraph from the 1971 Senate report is identical to the corresponding paragraph in S. Rep. No. 925, 91st Cong., 1st Sess. 114 (1970), a report on an earlier bill that never became law. Yet there was a major difference between S. 35 (1971) and S. 1830 (1970). The following is the language of S. 35, with words added to S. 1830's language in italics and words deleted from it in brackets:

> The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State and all other persons which are based on aboriginal right, title, use, or occupancy of land in Alaska . . . , including all [land] claims [(but not claims based on grounds other than loss of original Indian title land)] *based upon original right, title, use or occupancy* pending before any court or the Indian Claims Commission on the effective date of this Act.

The fact that the 1971 report said it was preserving claims based on "grounds other than loss of original Indian title land," when precisely that language had just been excised from the 1971 Senate bill, persuades us that the district court was correct in concluding that the verbatim carryover of the 1970 Senate report language into the 1971 Senate report was just a hasty mistake.

(3) The Inupiats claim that the 1971 change in the language of the Senate bill made and was meant to make no substantive change. The chronology of the change suggests otherwise, *see* 435 F. Supp. at 1028. At any rate, the very fact that the language of the Senate bill *was* changed, and from language that preserved the trespass claims to language that at the very best was ambiguous about the trespass claims, undermines the Inupiats' contention. They have advanced no reason why this change was made. In these circumstances, we are inclined to credit the post-Act testimony of Senator Stevens of Alaska, who said that the filing of the trespass-based *Edwardsen* v. *Morton* and the reporting of the House bill's broader extinguishment clause "caused us in the Senate to reconsider the language of our extinguishment provision, and we concluded that it should be broadened so as to leave no doubt that the settlement would be total . . . ." *Alaska Native Claims Settlement Act Amendments: Hearings on H.R. 6644 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 94th Cong., 1st Sess. 110 (1975), *quoted in* 435 F. Supp. at 1028 n.59. We conclude that, whether or not in 1970 the Senate wanted to preserve Native trespass claims, in 1971 it intended to and did vote to extinguish them.

(4) Even in the absence of the foregoing, a strict reading of the 1970 Senate bill's language would compel the conclusion that the only trespass claims preserved by the parenthetical "(but not claims based on grounds

other than loss of original Indian title land)" would be those "pending" before a court or agency on the Act's effective date. Since no Inupiat suit against the private defendants was pending on that date, we would have to hold the claims in this case extinguished even if the 1970 Senate bill (or its spirit) were the governing law.

(5) Finally, whatever the Senate bill and report entailed, it was the *House* version of § 4 that emerged victorious in the Conference Committee and was then approved by both houses. The Conference bill followed the House bill almost word-for-word, omitting only two words and adding a few phrases not material here. The organization of the Senate bill was substantially different. True, the conference report stated, "The conference report language is, in substance, the same as the language of the Senate amendment." Conf. Rep. 40, *reprinted in* [1971] U.S. Code Cong. & Ad. News 2253. However, this sentence was immediately followed by language quoted above to the effect that "*all* aboriginal claims" were extinguished, and that "the language of settlement is to be broadly construed to eliminate such claims," and was included in a section entitled "Major Differences Between the Conference Report and the Senate's Amendment in the Nature of a Substitute to the House Passed Bill." Thus it is clear that the conference bill followed the intent of the House. When it was said that its language was "in substance, the same as the language of the Senate amendment," this signified only that the conferees also interpreted the Senate's language to extinguish Native trespass claims.

In sum, nothing in the Senate report or the other legislative history convinces us that Congress really meant, in the teeth of the statutory language, to preserve the trespass claims asserted in this case.

IV. RULES OF CONSTRUCTION

The Inupiats also advance several arguments based upon rules of statutory construction. It is true that in cases of ambiguity statutes are to be construed (1) in favor of Indians; (2) to avoid constitutional questions; (3) to avoid taking vested rights; and (4) non-retroactively. However, these are only guidelines, not substantive laws, and should not be used to defeat the manifest intent of Congress. It cannot be doubted that Congress has power to pass a law that violates the spirit of all four of these rules, and we should not deny effect to such a law when it is enacted. Moreover, both the Conference and House reports direct, as we point out above, that § 4 be construed "broadly" to extinguish all claims and litigation, and this takes precedence over generalized rules of construction.

We add the following comments. The rule of construction of ambiguous statutes in favor of Indians is based on a concern that the powerful not take advantage of the helpless and uneducated. A similar concern guides modern law on the construction of contracts of adhesion. Where, as here, the Inupiats were represented before Congress by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark, we think the rule of construction operates with less force.

We also find the rule to construe statutes to avoid constitutional questions to be less compelling than the rule, not implicated here, to construe statutes so as not to be forced to hold them unconstitutional. The constitutional question we are asked to obviate is whether or not under the Fifth Amendment compensation must be paid for taking the Inupiats' trespass claims. Our holding here clears the way for this question to be addressed in

some other forum, but we express no opinion on what the answer should be.

Although we recognize the rules of construction regarding takings and retroactivity, we find that Congress has sufficiently clearly expressed its intent in these areas.

V. ISSUES NOT REACHED

Our disposition of this case makes it unnecessary for us to decide (1) whether or not the Inupiats ever had or retained aboriginal title to all the land they claimed; (2) whether or not the aboriginal title had already been extinguished before the Act and before the trespasses alleged here; (3) whether or not Congress gave just compensation for the package of various Native properties and interests it took and extinguished by giving the Natives 40 million acres of land and nearly a billion dollars; and (4) whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States. Perhaps these questions will be decided in *Inupiat Community of the Arctic Slope* v. *United States*, No. 77-596 (Ct. Cl., filed Dec. 16, 1977). We note that if they are decided favorably to the Inupiats there, the Inupiats might recover as just compensation from the United States the same amount that they could have recovered from the trespassing private defendants in the absence of the Act.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

No. A 75-215 Civil

UNITED STATES OF AMERICA,
Plaintiff,

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Plaintiff-Intervenor,

v.

ATLANTIC RICHFIELD COMPANY, *et al.*,
Defendants.

Before HONORABLE JAMES M. FITZGERALD,
Judge Presiding

OPINION

The United States, acting in its own behalf and on behalf of Eskimos inhabiting the Arctic Slope of Alaska, sues the State of Alaska and one hundred forty corporations and private parties for trespass to Native land prior to the passage of the Alaska Native Claims Settlement Act.[1] The intervenor, Inupiat Community of the Arctic Slope, a recognized Eskimo tribal entity, makes similar but somewhat more extensive claims.[2]

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[1] 43 U.S.C. § 1601 *et seq.* Hereinafter referred to as the Settlement Act.

[2] More specifically, the United States claims damages for entries to land aboriginally used and occupied by the Arctic Slope Natives where: (1) the entry was unauthorized; (2) the entry and trespass were under color of the Statehood Act of 1958, 72 Stat. 339, but in violation of explicit terms con-

The underlying theory of both the complaint and the complaint in intervention is that until the 1971 Settlement Act the Eskimos of the Arctic Slope had a right of exclusive possession to the Arctic Slope of Alaska based on use and occupancy of that region from time immemorial, or as it is sometimes termed, "aboriginal title."

The case is here on defendants' joint motion to dismiss all claims of trespass to land claimed on the basis of aboriginal title.[3] The case raises important questions of law arising under the Settlement Act and federal common law regarding Indian rights. In order to fully develop the issues presented, it is necessary to review the background of the Settlement Act.

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tained therein which affirmatively protected Native rights; or (3) the entry was made under federal authorization but the entry interfered with substantial and notorious Native use resulting in destruction of Native possessions, such as homes, hunting or trapping grounds, and other physical structures. Damages to the Eskimos are alleged to include the disturbance of game animals, the extraction of oil and gas, the obtaining of geophysical information of great value, and the construction of roads, buildings, airfields and other structures.

Intervenor claims damages for all entries on the North Slope prior to December 18, 1971; the value of any geologic and geophysical information obtained as a result of oil exploration on Arctic Slope land; the royalty value of gravel or other mineral resources obtained as a result of trespass on the Arctic Slope; damages for destruction of wildlife; damages for theft or disturbance of chattels; and damages for injury to real property and structures.

[3] All claims which may lie for injury to personal property or real property individually owned, as opposed to property claimed by right of aboriginal use and occupancy, are excepted from the motion to dismiss. Such claims, however, are not adequately stated by the complaints filed in this case.

Jurisdiction over the claims of the United States is conferred by 28 U.S.C. § 1345. Jurisdiction over the claims of intervenor is based on 28 U.S.C. §§ 1331, 1362.

I. HISTORY OF ALASKA NATIVE LAND CLAIMS

The claims of the Native people to the land and resources of Alaska had been a source of potential conflict and uncertainty for over a century before Congress finally undertook to settle the aboriginal claims in the late 1960's.

The Treaty of Cession [4] by which the United States purchased Alaska from Russia in 1867 did not address the property rights of the Native inhabitants. It provided that the Natives would be subject to such laws as the United States might adopt with respect to aboriginal tribes.

The first statute to mention the land rights of Alaska Natives was the Organic Act of 1884 [5] which provided for a civil government and extended the mining laws of the United States to Alaska. Section 8 of the Organic Act provided:

> . . . that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. . .

Congress proceeded to open Alaska to settlement and development by extending the general land laws to Alaska. The Act of March 3, 1891 authorized the establishment of townsites and conveyances of town lots to individual

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[4] Treaty of March 30, 1867, 15 Stat. 539.

[5] Act of May 17, 1884, Ch. 53, 23 Stat. 24.

occupants.[6] In 1898 Congress extended the homestead laws to Alaska[7] and in 1900 the mining laws of the United States to Alaska in the second Organic Act.[8] In 1914 Congress enacted the Alaska Coal Lands Act, directing the President to reserve potential coal-bearing lands and issue leases for those lands.[9] The Mineral Leasing Act enacted in 1920[10] authorized the Secretary of the Interior to lease lands owned by the United States which contain deposits of coal, oil and other minerals. Some of these enactments contained provisions exempting or protecting from disposition lands actually occupied by Natives. The second Organic Act, for example, provided that Natives "shall not be disturbed in the possession of any lands now actually in their use and occupancy. . ." However, other statutes, such as the Mineral Leasing Act, did not contain any provisions respecting Native occupancy.

Under these laws, appropriate administrative officials authorized entries on, and disposition of, Alaska lands without regard to aboriginal title claims of Natives.

In the Alaska Native Allotment Act,[11] Congress for the first time provided a means by which individual Alaska Natives could obtain legal title to land they occupied. The Act provided for the allotment of home-

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[6] Act of March 3, 1891, Ch. 561, 26 Stat. 1095, 43 U.S.C. § 732.

[7] Act of May 14, 1898, Ch. 299, 30 Stat. 409, 43 U.S.C. § 270.

[8] Act of June 6, 1900, Ch. 786, 31 Stat. 321, *as amended*, 30 U.S.C. § 49(a).

[9] Act of Oct. 20, 1914, Ch. 330, 38 Stat. 741.

[10] Act of Feb. 25, 1920, Ch. 85, 41 Stat. 437, *as amended*, 30 U.S.C. § 181 *et seq.*

[11] Act of May 17, 1906, Ch. 2469, 34 Stat. 197.

steads of up to 160 acres of non-mineral land. However, only 80 allotments, most of which were in southeastern Alaska, were issued under the Act during the first 54 years after its passage. Knowledge of the provisions of the Allotment Act and the means to apply for lands under its provisions were not available to most Alaska Natives.[12]

Under a 1926 Act, Congress extended the provisions of the townsite laws to Alaska Natives, providing for the patenting of lots within Native townsites to the occupants. Native townsite residents received a restricted deed, inalienable except by permission of the townsite trustee.[13]

Significantly, in Alaska, unlike the Lower 48, there were never treaties between the United States and Alaska Native groups designating lands which Natives were entitled to occupy or defining their rights to the taking of fish and game. Congress created only one reservation in Alaska, an 86,000 acre reservation in southeastern Alaska for the Metlakatla Indians.[14] Between 1914 and 1917 the President made various Executive Order withdrawals of Alaskan land for the benefit of Native groups.[15] In 1936 the Secretary of the Interior was

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[12] Senate Report No. 92-405, 92d Congress, 1st Session at 91 (1971).

[13] Act of May 25, 1926, Ch. 379, 44 Stat. 629, 43 U.S.C. § 733.

[14] Act of Mar. 3, 1891, Ch. 561, § 15, 26 Stat. 1101, 25 U.S.C. § 495.

[15] *E.g.*, Ft. Yukon, Executive Order No. 1896 (Feb. 24, 1914); Klukwan, Executive Order No. 2227 (Aug. 2, 1915); Chilkat, Executive Order No. 2228 (Aug. 2, 1915); Yendistucky, Executive Order No. 2388 (May 25, 1916); Norton Bay, Executive Order No. 2508 (Jan. 3, 1917); Akiak, Executive Order No. 2757 (Nov. 22, 1917); Mountain Village, Executive Order No. 2757 (Nov. 22, 1917); Tatitlek, Executive Order No. 2757 (Nov. 22, 1917).

authorized to designate reservations in Alaska upon vote of the adult Native residents within the proposed reservation.[16] Only six such reservations were created, none of which were on the North Slope. Alaskans, both Native and non-Native, opposed creation of reservations on the grounds that reservations were socially divisive and tended to perpetuate a wardship rather than equality for the Natives. Four villages voted down proposed reservations and one was declared invalid by the Territorial Court. *United States* v. *Libby, McNeill & Libby*, 107 F. Supp. 697 (D. Alaska 1952).[17]

In 1935 Congress enacted a jurisdictional statute which allowed the Tlingit and Haida Indians of southeastern Alaska to bring suit in the Court of Claims for compensation for land and tribal property rights expropriated by the United States and for the failure by the United States to protect those property rights from usurpation by non-Natives.[18] However, it took over 35 years for the Tlingits and Haidas to receive compensation.

In 1959 the Court of Claims held that the Tlingits and Haidas had established title to six areas.[19] Judgment for $7,546,053.80 was entered in 1968. Money was not appropriated to pay the judgment until 1970.

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[16] Act of May 1, 1936, Ch. 254, § 2, 49 Stat. 1250, 25 U.S.C. § 496.

[17] Federal Field Committee for Development Planning in Alaska, *Alaska Natives and the Land*, Chap. V. See also, E. Gruening, *The State of Alaska*, Ch. 25, p. 365-381 for an account of the opposition of Alaskans to the Department of Interior's plan to create Indian reservations throughout Alaska.

[18] Act of June 19, 1935, Ch. 275 § 2, 49 Stat. 388.

[19] Tlingit and Haida Indians of Alaska v. United States, 147 Ct.Cl. 315, 177 F.Supp. 452 (1959).

Nevertheless, the Tlingit and Haida Indians fared better than the Tee-Hit-Tons, who failed to get any compensation whatsoever when they went to court without the aid of a jurisdictional statute. The Supreme Court held that unrecognized aboriginal title was not a property interest protected by the Fifth Amendment from government taking without compensation. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955).

When the *Tee-Hit-Ton* decision was handed down, Congress was deliberating the question of statehood for Alaska. However, statehood was not approved until 1958 when Congress enacted the Alaska Statehood Act.[20]

The confrontation of Native and non-Native over ownership and use of the land accelerated after statehood. Section 6 of the Statehood Act authorized the State to select 102,500,000 acres from public lands that were "vacant, unappropriated, and unreserved at the time of their selection." [21] The intent of Congress was, of course, to provide the new state with a solid economic foundation.[22] State land selections required the approval of the Secretary of the Interior who was the official with authority to patent selected lands to the State.[23] Section 6(g) authorized the State to execute conditional leases and make conditional sales of selected lands following tentative approval but prior to issuance of the final patent.[24]

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[20] Act of July 7, 1958, Pub.L. No. 85-508, 72 Stat. 339, *as amended*, 73 Stat. 141 (hereinafter Statehood Act). 48 U.S.C. prec. 21 note.

[21] Sections 6(a) and 6(b) of the Statehood Act, 72 Stat. 339, 340.

[22] See, U.S. Code Congressional and Administrative News, 85th Cong., 2d Sess. (1958) Legislative History, 2933.

[23] Section 6(a) and 6(g), 72 Stat. 339, 340-341.

[24] 72 Stat. 339, 342.

The Statehood Act further provided that the State of Alaska would receive 90% of the revenues derived by the United States from coal and mineral leases of the lands retained by the United States in Alaska.[25]

Significantly, the Statehood Act also contained a provision protecting Native rights. Section 4 of the Act provided that the State disclaimed any right or title to "any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts . . . or is held by the United States in trust for said Natives. . ." [26]

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[25] 72 Stat. 339, Section 28.

[26] It is important to read the full text of Section 4 of the Statehood Act to understand how Section 4, when read in conjunction with the grant to the State in Section 6, is subject to differing interpretations by the parties herein. Section 4, as amended in 1959, 73 Stat. 141, provides:

> As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right of title to which may be held by said natives or is held by the United States in trust for said natives, shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided,* That nothing contained in this Act shall recog-

In the 1960's the State proceeded to select land as provided in Section 6 of the Statehood Act.

In 1964 and 1965 the State selected, and the Secretary of the Interior tentatively approved, approximately 1,650,000 acres of land on the Arctic Slope, a region in which the existence of large oil deposits was suspected.[27] Reports of oil deposits in Prudhoe Bay, one of the selected areas, were confirmed in 1968. In 1969 the State conducted sales of oil and gas leases for tentatively approved Arctic Slope lands. The lease sale was vigorously protested by Alaska Natives. Nevertheless, oil companies, including a number of the defendants in this lawsuit, paid over 900 million dollars to acquire oil and gas leases.

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nize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claim shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further,* That no taxes shall be imposed by said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.

[27] Federal Field Committee, *Alaska Natives and the Land,* 456-7 (1968). During the 90th Congress the Senate Committee on Interior and Insular Affairs commissioned the Federal Field Committee for Development Planning in Alaska to prepare a report concerning the Native land claims. The report *Alaska Natives and the Land* is an important document in the legislative history of the Settlement Act. Senate Report No. 92-405, 92d Cong., 1st Sess. (1971), 74.

Meanwhile, the Secretary of the Interior, in a series of public land orders issued between 1958 and 1965, had authorized locations and entries under the mining laws and leases pursuant to the Mineral Leasing Act on various areas of the Arctic Slope. Pursuant to these land orders and federal leases, numerous private parties including many of the present defendants participated in oil and gas explorations on the Slope.

Certain initial State land selections were protested by the Bureau of Land Management on behalf of Native villages. As State selections continued, Alaska Natives began organizing themselves into groups and associations and the number of Native protests and land claims mounted steadily. The Alaska Federation of Natives was organized in 1966, and regional Native associations were organized throughout Alaska. By April, 1968, forty claims covering 296,000,000 acres, approximately 80% of the State, had been filed.[28] The North Slope Native Association had filed a claim to virtually the entire North Slope.[29] In short, most of the State land area, and virtually all of the commercially valuable land, were subject to Native protests.

Partly in response to the mounting protests, the Secretary of the Interior instituted a land freeze policy whereby federal patenting and approval of State selections and other applications for public lands were suspended pending a legislative settlement of the controversy.[30]

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[28] Alaska Natives and the Land, 442.

[29] *Id.* at 456.

[30] The land freeze was made official in Public Land Order No. 4582, issued January 12, 1969, which reads as follows:

> Subject to valid existing rights, and subject to the conditions hereinafter set forth, all public lands in Alaska

Because the freeze was thought to be a serious threat to Alaska's economy, the State attempted, unsuccessfully, to obtain a court order requiring the Secretary of the Interior to approve pending State selections and patent others which were subject to Native claims. *Alaska* v. *Udall*, 420 F.2d 938 (9th Cir. 1969), *cert. denied*, 397 U.S. 1076 (1970).[31] The State then turned to Congress for a solution.

Native leaders by then had also concluded that they should petition Congress for a prompt legislative settlement of their land claims. The past experience of the Tlingits and Haidas and the Tee-Hit-Tons showed that the alternative of taking the claims to court must in-

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which are unreserved or which would otherwise become unreserved prior to the expiration of this order, are hereby withdrawn from all forms of appropriation and disposition under the public land laws (except locations for metalliferous minerals), including selection by the State of Alaska pursuant to the Alaska Statehood Act (72 Stat. 339), and from leasing under the Mineral Leasing Act of February 25, 1920, 41 Stat. 437; 30 U.S.C. 181 et seq., as amended, and reserved under the jurisdiction of the Secretary of the Interior for the Interior for the determination and protection of the rights of the Native Aleuts, Eskimos and Indians of Alaska. The withdrawal and reservation created by this order shall expire at 12 p.m. (midnight), A.S.T., Decemebr 31, 1970.

[31] The district court granted the State summary judgment, ruling that as a matter of law the land in question was "vacant, unappropriated and unreserved" and therefore open to State selection under the Statehood Act. The Ninth Circuit reversed on the ground that material questions of fact existed as to whether the lands selected by the State were actually vacant or were occupied by the Natives. The court suggested that the lawsuit be stayed pending anticipated legislative action to resolve the controversy. 420 F.2d at 940.

evitably lead to long delay.[32] Beginning in 1967, the Alaska Federation of Natives caused bills to be introduced in every session of Congress and lobbied for their passage.[33] In December, 1971, they succeeded in obtaining a legislative settlement that included substantial grants of land in addition to monetary compensation for the extinguishment of Native claims.

The express purpose of the Settlement Act, as set forth in Section 2, the Declaration of Policy, was to meet the "immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims." [34] Congress found that a settlement had to be accomplished "rapidly, with certainty, [and] without litigation. . . ." [35]

Section 4 of the Settlement Act contains the declaration of settlement.[36] The meaning and scope of the extinguishment section is disputed by the parties to this lawsuit and is the controlling question of law now before the court.

In conjunction with these extinguishments, Section 6 of the Act provides for a cash settlement of $962,500,000 to be paid over a period of years. Of that sum, $462,-500,000, or roughly half, is to be paid from the federal

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[32] See Arnold, *Alaska Native Land Claims,* (1976) (published by Alaska Native Foundation); E. Gruening, *The State of Alaska,* (1968 ed.) at 541.

[33] See Senate Report No. 91-925, 91st Cong., 2d Sess. 1970, 90-99 for a detailed summary of the bills considered by the 90th and 91st Congress.

[34] 43 U.S.C. § 1601(a).

[35] 43 U.S.C. § 1601(b).

[36] 43 U.S.C. § 1603.

treasury.[37] The remainder will be paid from the revenues derived from disposing of the leasable minerals on public lands in Alaska, including lands tentatively approved to the State and lands which the State will select in the future. (Section 9)[38] In addition to the monetary grant, the Act grants the Alaska Natives fee title to more than 40 million acres of lands, to be selected by the Native villages and regional corporations from lands in Alaska withdrawn for that purpose. (Section 12)[39] All future revenues to be derived from the land patented to the Natives will, of course, be the property of the Native corporations.[40] Under the Act, individual Natives are allowed to pursue pending allotment applications.[41]

Any summary of the background to the Settlement Act and the instant lawsuit would not be complete without mention of *Edwardsen* v. *Morton*, 369 F.Supp. 1359 (D.D.C. 1973). That case was filed October, 1971, in the United States District Court for the District of Columbia while Congress was in the final stages of consideration of the terms of the Settlement Act. The plaintiffs included Charles Edwardsen, Jr., Executive Director of the Arctic Slope Native Association, the Inupiat Community of the Arctic Slope and several Native villages and individual Eskimos of the Arctic Slope. The named defendants were the Secretary of the Interior and subordinate officials. The complaint alleged that the federal officials had unlawfully transferred and permitted trespass to Arctic Slope lands claimed and occupied by Inupiat Eskimos under aboriginal title. Plaintiffs alleged

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[37] 43 U.S.C. § 1605.

[38] 43 U.S.C. § 1608.

[39] 43 U.S.C. § 1611.

[40] 43 U.S.C. §1606(i).

[41] 43 U.S.C. § 1613(h)(5), § 1617(a).

that all State land selections on the North Slope and tentative approvals thereof were illegal and sought declaratory and injunctive relief to this effect. Plaintiffs also sought an order requiring the Secretary to account to the plaintiffs for all monies received by the State of Alaska, including the $912 million received by the State in the September, 1969, Prudhoe Bay oil and gas lease sale, and other third persons as a result of the tentative approvals. The complaint was later amended to state a claim for a money judgment against the Secretary.

After passage of the Settlement Act, the defendants in *Edwardsen* moved for summary judgment on the grounds that the Settlement Act barred all of plaintiffs' claims. The district court granted summary judgment for the federal defendants on the claims to the tentatively approved State lands, holding that the Settlement Act validated all prior tentatively approved State selections. However, the district court denied summary judgment as to the accounting and damage claims, holding that the Settlement Act did not extinguish tort claims that accrued prior to enactment of the Settlement Act.

No appeal was taken from the decision of the district court in *Edwardsen*. Instead, the federal defendants entered into a stipulation with the plaintiffs which required federal officers to conduct an investigation of plaintiffs' trespass claims and thereafter to recommend that the Attorney General institute damage actions on the Natives' behalf.

This lawsuit followed.

II. PRELIMINARY ISSUES

The main argument in support of the motion to dismiss is that the Settlement Act conclusively extinguished, and therefore bars, all claims based on aboriginal use

or occupancy, including claims of past trespass to lands claimed by aboriginal title.

However, defendants also raise several preliminary issues by arguing that the aboriginal title claimed by the Arctic North Slope Eskimos was extinguished even prior to passage of the Settlement Act by operation of various federal statutes concerning disposition and use of federal land in Alaska, including the Alaska Statehood Act.

First, defendants argue that the Treaty of Cession extinguished the aboriginal title of all Native peoples in Alaska.[42]

Second, defendants contend that between cession and statehood the federal government exercised "complete dominion" over Alaska lands in a manner adverse to the existence of a Native right of exclusive possession and thereby extinguished all aboriginal title.[43]

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[42] In Miller v. United States, 159 F.2d 997 (9th Cir. 1947), a condemnation action brought by the United States to obtain unencoumbered fee title to tidelands in Juneau for the purpose of building a wharf, the Ninth Circuit held that no communal claim of aboriginal title survived the Treaty of Cession. However, this holding was impliedly overruled by the Supreme Court in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

[43] In United States v. Santa Fe Pac. R.R., 314 U.S. 339 (1941), the Supreme Court stated that the right of the United States to extinguish aboriginal title may be exercised "by treaty, by the sword, by purchase, by the exercise of complete dominion adverse to the right of occupancy, or otherwise. . ." 314 U.S. at 347. The Ninth Circuit recently applied the "complete dominion" theory in United States v. Gemmill, 535 F.2d 1145 (9th Cir. 1976). In *Gemmill*, the court reviewed a "century-long course of conduct" to conclude that a tribe's aboriginal title had been extinguished *de jure* even though any one of the specific federal actions, "examined in isolation, may not provide an unequivocal answer to the question of extinguishment." 535 F.2d at 1149.

Third, relying on the Supreme Court in *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962),[44] defendants argue the Statehood Act authorized the State to select and obtain clear title to lands claimed under aboriginal title, thereby extinguishing inconsistent aboriginal title to the selected lands, but preserved the Natives' right to seek compensation from the federal government for the lands granted to the State. Plaintiff and intervenor, on the other hand, contend that the intent of Congress in the Statehood Act was to preserve the status quo of Native occupancy, not to extinguish the right of aboriginal occupancy; hence State selection was limited to lands not occupied or claimed by Natives. Plaintiff and intervenor concede that under this interpretation of the Statehood Act, the State would likely

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[44] In the *Kake* opinion Justice Frankfurter, relying on the early legislative history of the Section 6 disclaimer provision of the Alaska Statehood Act, stated:

> It was understood that the disclaimer provision left the State free to choose Indian "property if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due. 369 U.S. at 65-66.

However, *Kake* is not controlling authority for the instant case because it did not involve the issue of whether the State could select Native lands. Instead, the issue before the Court was whether the reservation of absolute jurisdiction over Native lands by the United States and the concomitant disclaimer by the State in Section 4 of the Statehood Act barred the State from applying its anti-fish trap conservation law to Indian fishing. The Court held the State could exercise its police powers over Indian fishing because the reservation of "absolute jurisdiction" did not mean exclusive jurisdiction and the State had disclaimed only its proprietary interests with respect to Native land, not its governmental and political interests. 369 U.S. at 68-69.

end up with substantially less than the allotted 103 million acres in view of the fact that Alaska Natives claimed aboriginal title by virtue of use and occupancy to almost all of the land in Alaska.

These contentions raise difficult issues. To determine whether, and to what extent, aboriginal title to the Arctic Slope may have been legally extinguished prior to passage of the Settlement Act would require close examination of almost every federal statute and federal government action relating to use of Arctic Slope lands between 1867 and 1971 in order to discern if there was some clear manifestation of Congressional intent to extinguish aboriginal title. *United States* v. *Gemmill*, 535 F.2d 1145 (9th Cir. 1976).[45]

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[45] In *Gemmill*, the Ninth Circuit held that extinguishment or aboriginal title occurs when the United States acts in a manner which manifests an intention to extinguish, regardless of the means or propriety of the action. "The relevant question is whether the governmental action was intended to be a revocation of Indian occupancy rights." *Gemmill, supra*, 535 F.2d at 1149.

Contrary to intervenor's contentions, aboriginal title, as opposed to Indian title recognized by treaty or reservation, is legally extinguishable when the United States makes an otherwise lawful conveyance of land pursuant to federal statute. Congressionally authorized conveyance of lands from the public domain demonstrates the requisite intent to extinguish the Indian right of exclusive use and occupancy to those lands. Thus, as the United States acknowledges, when the Secretary of the Interior issued a patent to a homesteader in Alaska, aboriginal title was extinguished with respect to the patented land. However, since the United States retained title to almost all of the Arctic Slope during the period in question, extinguishment of aboriginal title by conveyance is not of import here. Whether tentative approval of State land selections legally extinguished aboriginal title presents a more difficult question because the Statehood Act can be

The Settlement Act, however, makes such an undertaking unnecessary. The intent of Congress in the Settlement Act was to settle the claims of Alaska Natives and to compensate them without deciding the difficult and disputed question of the existence and extent of aboriginal title to Alaska lands. The Act's Declaration of Settlement reads: "All aboriginal titles, *if any* . . . are hereby extinguished." (emphasis added)[46] Congress was aware that claims of aboriginal title raised difficult questions of law and fact. The difficulty was in large part due to the long delay before Congress directly confronted settlement claims based on aboriginal title. The Settlement Act was the first and only legislative action in which Congress considered and undertook to resolve the claims of Alaska Natives. The Treaty of Cession and Congressional legislation, including the Statehood Act, which preceded the Settlement Act, incidentally affected issues relating to Native land claims but did not purport to resolve them. It is appropriate then to look directly to the Settlement Act, rather than to previous legislation, to discern Congressional intent with respect to settlement and extinguishment of claims based on aboriginal title.

The legislative history of the Statehood Act fails to clarify Congressional intent with respect to Native use and occupancy.[47] In fact, there is very little reference to

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read as preserving Native occupancy rights. Conveyance of land in derogation of a Congressional directive to respect and protect Native occupancy would be void and legally ineffective to extinguish aboriginal title.

[46] 43 U.S.C. § 1603.

[47] Defendants' interpretation of what Congress intended in the Statehood Act is more persuasive since that construction gives effect to an important purpose of the Statehood Act to insure that the new state would be economically

Native land claims in the legislative history on the Statehood Act. This is so because Congress was principally concerned with achieving statehood for Alaska, not with settlement of Native land claims. Given the difficulty of winning Congressional approval for Alaska statehood,[48] Congress undertook to bypass, rather than to resolve the complex and difficult questions arising out of Native claims.[49]

Nevertheless, the Statehood Act is important insofar as it is a significant part of the background of the Settlement Act and contributes to an understanding of legislative intent in the Settlement Act. As noted, the conflicting claims by the State of Alaska and by Alaska Natives to lands selected by the State pursuant to the Statehood Act and the land freeze imposed by the Secretary of the Interior precipitated demands on Congress

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viable. The construction urged by plaintiff and intervenor would defeat that purpose since the State would be virtually without land or resources for its support. However, given the patent ambiguity in the terms of the Statehood Act itself and the absence of clarifying legislative history, I decline to rule that the Statehood Act requires dismissal of the claims against the State and its leaseholders.

[48] See E. Gruening, The State of Alaska, *supra*, Chap. 28, for a detailed account of the political obstacles in the path of Alaska statehood.

[49] Senate Report 92-405 expresses a similar conclusion in explaining the background of the Alaska Native land claims. The Report concludes that Section 4 of the Statehood Act was intended to maintain the "status quo . . . with respect to Native use, occupancy, and title to lands in Alaska until Congress could act upon these questions." The Report further states that Congress "has reserved to itself the full power to define, confirm, deny, or extinguish Native title, and with minor exceptions, Congress has so far declined to do so." S. Rep. No. 92-405 at 75-76, 92nd Cong., 1st Sess. (1971).

to enact legislation bringing about settlement of Native land claims.[50] As will be discussed in the following section, Congress specifically addressed and resolved the problem of the conflicting State and Native claims to tentatively approved lands in subsection 4(e) of the Settlement Act.

To summarize, I decline to decide whether aboriginal title to the Arctic North Slope was extinguished in whole or in part by the Treaty of Cession, or by the exercise of complete dominion over Alaska lands between cession and statehood, or by operation of the Statehood Act. The decision in this case rests on the Settlement Act since that legislation was specifically directed to final resolution and settlement of Native land claims. Nor is it necessary to look to other statutes to discern Congressional intent to extinguish Native land claims since I conclude, for reasons to follow, that Section 4 of the Settlement Act unequivocably extinguished claims based on aboriginal title which are asserted in this lawsuit. Accordingly, for the purpose of the motion to dismiss, it is assumed without so deciding, that aboriginal title to the Arctic Slope was not legally extinguished prior to the Settlement Act.

III. CONGRESSIONAL INTENT IN SECTION 4 OF THE SETTLEMENT ACT

The pivot of this case is Section 4 of the Alaska Native Claims Settlement Act, the extinguishment provision. Section 4 of the Act, 43 U.S.C. § 1603, provides:

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[50] See Senate Report 92-405, 92nd Congress, 1st Session, 94-98, (1971), for the Senate Committee's account of the conflict between the State and Alaska Natives and between the State and the United States which necessitated the Settlement Act.

(a) All prior conveyance of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.

(b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.

(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

No dispute is raised as to the meaning of subsection 4(b). The parties agree that 4(b) resolved the question of existing land titles by extinguishing, as of December 18, 1971, any and all aboriginal title in Alaska. After that date, no Native group had aboriginal title or could claim aboriginal title to any land in Alaska.

Contentions as to interpretation and construction of subsection 4(a), however, differ sharply. According to plaintiffs and intervenors, 4(a) validated as of December 18, 1971, prior federal conveyances and tentative approvals of State land selections which were void when actually made. According to this interpretation, the State leases previously issued to various oil companies were not valid and all activities on lands covered by such leases

were trespasses until the effective date of the Settlement Act.

Defendants, by contrast, contend that 4(a) validates the prior federal conveyances, including tentative approvals of State land selections, and operated to extinguish aboriginal title as of the date of the prior conveyance.

On examination of the language of the statute, the circumstances surrounding the enactment, and the pertinent legislative history, I conclude that the unmistakable intent of subsection 4(a) is not only to validate prior conveyances of public land in Alaska, including tentative approvals of State land selections under the Statehood Act, but to dispel any doubt that aboriginal title to such lands was extinguished at the time of tentative approval or conveyance.

The language of 4(a) tends to refute the contention that the provision was intended merely to recognize existing titles and leases as of the date of the Settlement Act without retroactively extinguishing aboriginal title. Instead of merely stating that prior conveyances are hereby validated, 4(a) specifically provides:

> (a) all prior conveyances of public land . . . and all tentative approvals . . . shall be regarded as an *extinguishment of the aboriginal title* thereto, if any. (emphasis added)

The choice of the words employed in subsection 4(a) indicates Congress intended that extinguishment relate back to the time of prior conveyance. Contrast the language of subsection 4(a) with subsections 4(b) and 4(c) which employ language indicative of the present tense. The choice of terms could not be accidental but reflects the intention of Congress that all prior conveyances of public land be recognized as passing title while at the

same time extinguishing aboriginal title as of the date of the conveyance or approval of selection.

> (b) all aboriginal titles, if any . . . are *hereby* extinguished. (emphasis added)
>
> (c) all claims . . . based on claims of aboriginal right, title, use or occupancy . . . are *hereby* extinguished. (emphasis added)

I conclude then that Congress chose the specific language used in subsection 4(a) by design. Congressional intent was to make clear that any prior grant of land under federal law or tentative approval under 6(g) of the Statehood Act operated to extinguish aboriginal title *at the time the conveyance was made or the approval given.* In short, Congress intended the conveyance or approval to be the operative fact extinguishing aboriginal title.

This construction is consistent with and is supported by other provisions of the Settlement Act. Subsection 14(g), 43 U.S.C. § 1613(g), provides:

> (g) all conveyances made pursuant to this Act shall be subject to *valid existing rights.* Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of one lessee, contractee, permitee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him . . . .

Subsection 14(g) protects the rights and expectations of persons who previously received an interest in land

pursuant to federal law. Plaintiffs' contention that these prior lessees, permitees, or grantees are liable for trespass for entries made prior to the effective date of the Settlement Act contravenes the express legislative purpose of fully protecting the rights of those who entered the North Slope in reliance on federal authorization.

Furthermore, the legislative history of the Settlement Act shows that Congress viewed the prior federal conveyances and State selections as effecting a taking of Native claimed lands for which compensation was being provided. Significantly, the legislative record makes numerous references to past takings of Native claimed land. For example, in the 1971 Senate Report, the Committee on Interior and Insular Affairs explains:

> Under section 5(a), [of S. 35] the Federal Government is obligated to pay into the Alaska Native Compensation Fund $500 million over a 12-year period as compensation to the Natives for lands and interests in lands taken in the past to which their claims are extinguished by the Act. Senate Report No. 92-405, supra, at 105.

And Senate Bill 35 as reported by the Committee and passed by the Senate on November 1, 1971, made it clear that those "past takings" included conveyances to the State and third parties. Section 2 of S. 35, the Declaration of Policy, provided in pertinent part:

> (3) a payment of $500,000,000 over a period of twelve years as compensation for lands taken in the past for Federal purposes or conveyed by patent or otherwise to the State of Alaska or to other third parties and for the extinguishment by this Act of all remaining claims or aboriginal rights;
>
> (4) a right to receive a portion of the revenues from the leasing and sale of minerals on certain lands in Alaska, subject to the limitations of this

> Act, as compensation for lands taken in the past and for the extinguishment by this Act of all remaining aboriginal rights. . . . S. 35 printed in Sen. Report No. 92-405, 92nd Congress, 1st Session at p. 2.[51]

Although this language was deleted from the Declaration of Policy when the House-Senate Conference Committee adopted the form of the House Bill in lieu of the Senate version, the change in wording does not indicate that Congress changed its belief that past conveyances effected a taking of aboriginal title.

Thus, the legislative history shows that Congress viewed previous federal conveyances of lands claimed by Alaska as past takings of aboriginal title and that the Settlement Act was intended to compensate the Natives for these past appropriations as well as for the extinguishment of any remaining aboriginal land rights.

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[51] Virtually indentical provisions were contained in S. 1830 and its counterpart H.R. 10193, bills considered in 1969-70 by the 91st Congress. S. 1830 was passed by the Senate but the House failed to take action on it so S.1830 was reintroduced in the 92nd Congress as S. 35.

The early bills introduced in 1967-68 in the 90th Congress authorized Alaska Natives to bring suit in the court of claims for compensation for lands taken. For example, the original proposal of the Alaska Federation of Natives to the 90th Congress, S. 2690, provided jurisdiction in the court of claims to award compensation at fair market value at the time of taking for all aboriginal title lands which had been appropriated and to grant the Natives title to all aboriginal lands to which title had not previously been conveyed to third parties by the United States. No action was taken by either the House or the Senate Interior Committees and the bills were not reintroduced in the 91st Congress. See S. Rep. No. 91-925, p. 91-94, for a detailed summary of the bills considered by the 90th Congress.

The legislative history squarely contradicts the construction of Section 4 urged by the United States and the Inupiat Community.

Moreover, the circumstances surrounding the enactment of the Settlement Act support the conclusion that Congress intended to make the extinguishment of aboriginal title relate back to the date of tentative approval of State land selections. Native claims pending at the time the Settlement Act was passed challenged not only the State's title to the tentatively approved lands (and, therefore, questioned the validity of the oil leases executed by the State) but also raised a question as to the State's right to the more than $900 million which the State had received from the September, 1969, oil lease sale. The legislative record shows that Congress was well aware of the controversy:

> The fact that unresolved Native claims have been made to most of the lands of Alaska has halted both federal mineral leasing and the transfer of lands selected by the State under the Statehood Act. Some contend that the Native land claims may also cast a cloud over the State's title to mineral revenues it has already received. . . . S. Rep. 92-405 at 73.

Congress addressed the problem in subsection 4(a). By providing that tentative approvals of State land selections extinguished any aboriginal title thereto, Congress affirmed the Secretary's authority to tentatively approve the State land selections pursuant to the Statehood Act and resolved all questions as to the validity of the State's right to the oil lease proceeds. Intervenor's interpretation of 4(a) as merely validating the State's title as of December 21, 1971, leaves unresolved the State's right to revenues received before December 21, 1971.

It is incomprehensible that Congress would fail to resolve in this legislation a question as important as the

State's right to the more than $900 million in revenues derived from the 1969 sale of oil leases on State selected land in Prudhoe Bay.

Moreover, it is inconsistent with the fact that the Settlement Act requires the State to contribute a portion of its oil and mineral revenues to the Settlement fund. Under Section 9 of the Settlement Act, the Natives have the right to receive $500 million in revenues to be derived from mineral leases on public lands in Alaska, including lands tentatively approved to the State or selected by the State.[52] Thus, Congress has already de-

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[52] Section 9 of the Settlement Act, 43 U.S.C. § 1608, provides in pertinent part:

> Revenue Sharing
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> (a) The provisions of this section shall apply to all minerals that are subject to disposition under the Mineral Leasing Act of 1920, as amended and supplemented.
>
> (b) With respect to conditional leases and sales of minerals heretofore or hereafter made pursuant to section 6(g) of the Alaska Statehood Act, and with respect to mineral leases of the United States that are or may be subsumed by the State under section 6(h) of the Alaska Statehood Act, until such time as the provisions of subsection (c) become operative the State shall pay into the Alaska Native Fund from the royalties, rentals, and bonuses hereafter received by the State (1) a royalty of 2 per centum upon the gross value (as such gross value is determined for royalty purposes under such leases or sales) of such minerals produced or removed from such lands, and (2) 2 per centum of all rentals and bonuses under such leases or sales, excluding bonuses received by the State at the September 1969 sale of minerals from tentatively approved lands and excluding rentals received pursuant to such sale before the date of enactment of this Act. Such payment shall be made

termined that the State must pay a certain amount of its mineral revenues toward settlement of Native claims. The effect of the claims asserted against the State in this lawsuit would be to require the State to pay not only its designated share of the settlement but additionally to account for all benefits received from tentatively selected Arctic Slope land prior to the Settlement Act.

In short, the circumstances surrounding enactment of the Settlement Act and the legislative history confirm that 4(a) means exactly what it says—prior convey-

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within sixty days from the date the revenues are received by the State.

(c) Each patent hereafter issued to the State under the Alaska Statehood Act, including a patent of lands heretofore selected and tentatively approved, shall reserve for the benefit of the Natives, and for payment into the Alaska Native Fund, (1) a royalty of 2 per centum upon the gross value (as such gross value is determined for royalty purposes under any disposition by the State) of the minerals thereafter produced or removed from such lands, and (2) 2 per centum of all revenues thereafter derived from the State from rentals and bonuses from the disposition of such minerals.

(d) All bonuses, rentals, and royalties received by the United States after the date of enactment of this Act from the disposition by it of such minerals in public lands in Alaska shall be distributed as provided in the Alaska Statehood Act, except that prior to calculating the shares of the State and the United States as set forth in such Act, (1) a royalty of 2 per centum upon the gross value of such minerals produced (as such gross value is determined for royalty purposes under the sale or lease), and (2) 2 per centum of all rentals and bonuses shall be deducted and paid into the Alaska Native Fund. The respective shares of the State and the United States shall be calculated on the remaining balance. . . .

ances of land from the federal domain and tentative approvals of State land selections extinguished any aboriginal title to the selected or transferred lands. Subsection 4(a) thereby eliminates any basis for Native claims relating to pre-Settlement Act entries on land tentatively approved to the State or previously conveyed to private parties.

Subsection 4(a) so construed requires dismissal of claims for entries under State leases pursuant to subsection 6(g) of the Statehood Act or entries pursuant to valid federal leases or conveyances. The majority of the claims are in this category. However, plaintiffs additionally assert damage claims for unauthorized entries on the North Slope. These remaining claims draw subsection 4(c) of the Settlement Act into contention.

Subsection 4(c) extinguishes:

> All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, ...

Plaintiff and intervenor contend that the phrase "claims based on claims of aboriginal right. . ." means claims for compensation for taking Indian land, not trespass claims. It is argued that Congress did not intend to extinguish the trespass claims asserted in this lawsuit.

The language of subsection 4(c) is clear and unequivocal. It explicitly extinguishes *all* claims that are based on claims of aboriginal occupancy. Claims of past trespass to lands claimed by reason of aboriginal title require as an essential element of proof a showing of aboriginal use and occupancy at some time in the past. Such trespass claims are claims "based on claims of

aboriginal occupancy" and fall within the scope of the plain language of subsection 4(c).[53]

Since subsection 4(c) specifically refers to claims against the State and all other persons, it plainly embraces claims beyond claims for appropriation of Indian land which are assertable only against the United States.

Given the plain and unambiguous meaning of the language of subsection 4(c), intervenor resorts to the legislative history in an effort to show that Congress did not intend in subsection 4(c) to extinguish trespass claims.

First, intervenor argues that the purpose of the Settlement Act was to clear title to Alaska land in order to permit development to proceed. Given this purpose, it is argued that Congress was not concerned with extinguishing damage claims for past trespasses because such trespass claims do not challenge present title. Certainly, the Settlement Act was intended to remove the cloud on Alaska land titles but that is not its sole purpose. The legislative history demonstrates that the Congressional concern included avoiding costly litigation and ending divisiveness between Native and non-Native in Alaska. If Congress had simply intended to eliminate clouds on title, it could have stopped with subsections 4(a) and 4(b).

Second, intervenor argues that the origin of the language "all other persons" demonstrates that Congress did not intend by including this language to extinguish tres-

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[53] Of course where individual Natives or a group of Natives have fee title or a leasehold interest in land, their claims of trespass to such land can be proven without a showing of aboriginal use or occupancy. Similarly, a claim of injury or loss of personal property does not depend on a showing of aboriginal title. Accordingly, such claims are not covered by subsection 4(c).

pass claims against third parties. Intervenor observes that the extinguishment clause of S. 1830 was amended to include claims against the State and all other persons, in addition to claims against the United States, in response to the urgings of the Western Oil and Gas Association (WOGA) during the 1969 Senate Committee hearings on S. 1830. Intervenor argues that the purpose of WOGA in proposing the additional language, and the purpose of Congress in enacting it, was merely to preclude Native title claims against the oil companies. However, the WOGA statement [54] on which intervenor relies

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[54] WOGA's statement to the Senate Interior Committee during hearings in April, 1969, on S. 1830 says in pertinent part:

> It is obviously desirable for the legislation to effectuate a complete settlement and extinguishment of the Native claims. Loose ends and uncertainties should not be left for subsequent resolution, and no basis should remain for asserting any of those claims in the future against anyone. Achievement of this objective requires a careful and comprehensive description of the claims.
>
> Section 3(a) of S. 1830 is a good beginning in this regard, but it should be improved in three respects:
>
> *First.* The settlement should specifically extend, not only to the United States, but also to the State of Alaska and all other persons to whom the United States has granted, sold, or leased lands claimed by the Natives. The Native claims are moral claims, not enforceable legal rights, to land. When lands claimed by the Natives are "taken" by the United States, either for its own use, or by transfer, sale, or lease to third parties, the Native claims to those lands are extinguished, and the Natives then have a moral claim to compensation for the loss. As the Federal Field Committee has pointed out, that claim, like the claim to the land itself, "is against the federal government." It is not against the third parties to whom the United States has transferred the lands or

shows that WOGA was concerned with precluding Native claims arising from past activities of the oil companies on the North Slope. Thus, intervenor's interpretation of subsection 4(c) finds no support in this part of the legislative history.

Finally, in attempting to avoid the terms expressed in subsection 4(c), plaintiff and intervenor rely heavily on a comment in the 1971 Senate Report explaining the scope of the extinguishment provision. The pertinent part of Senate Report No. 92-405 states:

> Subsection 4(a) declares that the provisions of this Act constitute a full and final extinguishment of any and all claims based upon aboriginal right, title, use or occupancy of land in Alaska. The language specifically includes submerged lands and any aboriginal hunting and fishing rights. The extinguishment is final and effective not only for claims

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interests therein. Congress has unfettered discretion to deal with these moral claims, both for land and compensation, as it thinks best, but it is generally agreed that the Natives should be fairly compensated, both for the lands which have been previously taken, and for the remaining claims which will be extinguished by the legislation. That, of course, is a basic purpose of S. 1830 which will provide compensation for past takings and present extinguishment. The necessary effect of that will be to leave no basis for asserting the Native claims against the United States or anyone else. Nevertheless, we think it desirable to spell this out clearly in the legislation by providing that the settlement extends to the United States and all other persons, which will include the State of Alaska, mineral lessees of the United States, and anyone else to whom the United States has granted any interest in lands claimed by the Natives. There will then be no possibility of future dispute.

> against the United States but also for any claims against the State of Alaska and all other persons. Remaining in effect and unextinguished by this Act are all claims which are based upon grounds other than the loss of original Indian title land. Included in such unextinguished claims are suits for an accounting for funds belonging to Natives or Native groups in the custody of the United States, for tort or breach of contract, and for violations of the fair and honorable dealings clause of the Indian Claims Commission Act. Specifically included, and dismised and extinguished under the terms of this Act, are all claims pending before the Indian Claims Commission and any court, Federal or State, which are based upon a claim of aboriginal right, title, use or occupancy. . . . Id. at 110.

Plaintiff's reliance on this somewhat ambiguous passage in the 1971 Senate Report is misplaced. The legislative history of the extinguishment provision of the Settlement Act clearly demonstrates that Congress intended to extinguish trespass claims based on aboriginal title.

First, reference to the 1969 Senate Committee hearings where former Justice Goldberg, attorney for the AFN, discussed with Senators Stevens and Metcalf the meaning and scope of the extinguishment clause in S. 1830 clearly show that the Senate Committee intended to distinguish between claims based on past Native use and occupancy of land on the one hand, and claims having nothing to do with aboriginal use and occupancy of land on the other hand. The former, including claims of traditional fishing rights, were extinguished. The latter, including, for instance, a claim that the United States breached the Fair and Honorable dealings clause by bombarding a Native village or a personal injury claim

by a Native working for the federal government, were not extinguished.[55]

Second, the language in the 1971 Senate Report on which intervenor relies is actually descriptive of language which appeared in the 1970 Senate Bill but was deleted from the 1971 bill as reported by the Senate Committee. The extinguishment provision of S. 1930 as passed by the Senate in 1970 read as follows:

> The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State and all other persons which are based upon aboriginal right, title, use, or occupancy of land in Alaska (including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist) by any Native, Native Village, or Native group or claims arising under the Act of May 17, 1884 (23 Stat. 321), or any other statute or treaty of the United States relating to Native use or occupancy of land, including all *land* claims (*but not claims based on grounds other than loss of original Indian title land*) pending before any court or the Indian Claims Commission on the effective date of this Act. S. 1830, 91st Cong., 2d Sess. §4(a) (1970) (emphasis added).

No action was taken by the House that year, so the Senate bill was reintroduced in early 1971 with the extinguishment provision in the same form.[56] No change in the extinguishment provision of the 1971 Senate Bill

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[55] Hearings on S. 1830 before the Senate Commission on Interior and Insular Affairs, 91st Cong., 1st Sess. (1969), 298-301.

[56] S. 35, 92d Cong., 1st Sess. § 4(a) 1971.

was made until October, 1971. On September 28, 1971, the House Committee reported out a more broadly worded provision.[57] On October 5, 1971, the *Edwardsen* suit was filed. On October 21, the Senate Committee reported its bill with an extinguishment provision that has been changed to more closely approximate the House version. The revised Senate extinguishment provision omitted the word "land" before "claims" and eliminated the proviso excepting claims based on grounds other than loss of original Indian title land.[58] Although the 1971

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[57] H.R. 10367, as reported by the House Committee, contained the following extinguishment provisions:

> SEC. 4. (a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All alleged aboriginal titles and claims of aboriginal title in Alaska based on use and occupancy, including any alleged aboriginal hunting and fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on alleged aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Alaska Native use and occupancy, including any such claims that are pending before any court or the Indian Claims Commission, are hereby extinguished.

[58] As reported, the provision had been changed to omit the following bracketed words and to added the underscored words:

> The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State and all other persons which are based upon aboriginal right, title, use, occupancy of land in Alaska (including submerged land un-

Senate Committee Report fails to give any reason for the change, the chronology of events outlined above indicates that the Senate adopted the broader House language to better express the intent to effect a comprehensive settlement that extinguished all claims based on aboriginal land rights, including the *Edwardsen* trespass and accounting claims.[59] The Senate's awareness of the *Edwardsen* claims is evidenced by the specific reference to that case in the 1971 Senate Report.[60]

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derneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist) by any Native, Native Village, or Native group or claims arising under the Act of May 17, 1884 (23 Stat. 24), or the Act of June 6, 1900 (31 Stat. 321), or any other statute or treaty of the United States relating to Native use or occupancy of land, including all [land] claims [(but not claims based on grounds other than loss of original Indian title land)] *based upon aboriginal right, title, use or occupancy* pending before any court or the Indian Claims Commission on the effective date of this Act. *All prior conveyances of public land and water areas in Alaska, or any interests therein, pursuant to Federal law, including tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of any and all Native claims thereto.*

[59] During the 1975 House hearings on proposed amendments to the Settlement Act, Senator Stevens, a member of the 1971 Senate Subcommittee on Interior and Insular Affairs, explained that the reporting of the broader extinguishment clause in the House bill in conjunction with the filing of Edwardsen v. Morton "caused us in the Senate to reconsider the language of our extinguishment provision, and we concluded that it should be broadened so as to leave no doubt that the settlement would be total. . . ." 1975 House Hearings on H.R. 6644, Serial No. 94-20, at J 110.

[60] Senate Rep. 92-405, 92nd Cong., 1st Sess. (1971), states: "In addition, litigation has in recent weeks been initiated by

The conference committee adopted the House version of the extinguishment provision. However, there was no real substantive difference between the final House and Senate extinguishment provisions.

The 1971 House Report states that Section 4 of the House bill, which is virtually identical to Section 4 of the Settlement Act, "extinguishes all aboriginal titles in Alaska, and all claims based thereon." [61] The House Report further offers the following specific explanation of the extinguishment provision:

> The section extinguishing aboriginal titles and claims based on aboriginal title is intended to be applied broadly, and to bar any further litigation based on such claims of title. The land and money grants contained in the bill are intended to be the total compensation for such extinguishment.[62]

Similarly, the joint House-Senate Conference report set forth the following explanation of the extinguishment provisions of the Settlement Act:

> It is the clear and direct intent of the conference committee to extinguish *all* aboriginal claims and *all* aboriginal land titles, if any, of the Native people of Alaska and the language of settlement is to be broadly construed to eliminate such claims and titles as any basis for any form of direct or indirect challenge to land in Alaska. (emphasis original).[63]

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the Arctic North Slope Native Association against the State of Alaska over the title to Prudhoe Bay." Id. at 98.

[61] House Report No. 92-523, at 8, 1971 U.S. Code Congressional and Administrative News at 2196.

[62] Id. at 2198.

[63] Conference Report No. 92-746, 40; Vol. 2, 1971 U.S. Code Congressional and Administrative News at 2196.

The trespass claims asserted in this lawsuit are an indirect challenge to land ownership in Alaska. It was the express intention of the Conference Committee to eliminate such indirect challenges to title.

Thus, Congress has expressly directed that the language of the Settlement Act be broadly construed to effectuate a comprehensive settlement of all Native claims based on aboriginal use and occupancy of land in Alaska and to bar any litigation based on such claims.

Broadly construing the clear language of subsection 4 (c) of the Settlement Act leaves no doubt that Congress intended to extinguish and did extinguish Native claims against the State of Alaska and private parties for trespass on aboriginal title lands prior to passage of the Settlement Act.

To summarize, I hold that subsection 4(a) extinguishes aboriginal title to lands tentatively approved to the State or conveyed pursuant to federal law as of the date of the tentative approval or conveyance.

Subsection 4(b) extinguishes all remaining aboriginal title and Native claims to land as of December 18, 1971.

Subsection 4(c) goes beyond extinguishment of claims for compensation for the taking of Indian land and extinguishes all Native claims based on alleged aboriginal occupancy, including claims against private parties for past trespasses.

IV. THE SETTLEMENT ACT'S EXTINGUISHMENT OF TRESPASS CLAIMS IS CONSTITUTIONAL

Intervenor contends that claims of trespass to aboriginal possession are protected property interests within the meaning of the Fifth Amendment.[64] It is argued that

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[64] The United States does not suggest that Congress had no power to extinguish accrued trespass claims but contends that Congress did not intend to do so in the Settlement Act.

Congress lacks power to cut off the rights of the Natives to seek judicial relief for third party interference with their possessory rights. Indeed, the *Edwardsen* court's concern that Congress might lack power to extinguish accrued trespass claims led that court to construe the Settlement Act as not affecting accrued trespass claims.[65]

My examination of relevant authorities leads me to conclude that trespass claims based on unrecognized aboriginal title are not protected property interests and, therefore, the Settlement Act's extinguishment of Native trespass claims against third parties presents no constitutional problem.

In *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), the Supreme Court determined the nature of the rights of Alaska Natives in lands claimed on the basis of aboriginal use and occupancy.

After concluding that Congress had not recognized the title of the Tee-Hit-Ton Indians to the lands they occupied, the Supreme Court held:

> [Unrecognized aboriginal title] is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupation may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. 348 U.S. at 279.
>
> * * * *
>
> . . . Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law. 348 U.S. at 285.

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[65] Edwardsen v. Morton, supra, 369 F.Supp. at 1379.

The Court also addressed the concept of aboriginal title in an earlier case, *United States* v. *Santa Fe Pacific R. Co.*, 314 U.S. 339 (1941). *Santa Fe* was a suit brought by the United States on behalf of the Walapai Tribe of Arizona to enjoin the Santa Fe Railroad from using certain land claimed by the Walapais by right of aboriginal occupancy and for an accounting of all rents and profits derived by the railroad from past use of the land in question. The Court explained aboriginal title thusly:

> Unquestionably it has been the policy of the Federal Government from the beginning to respect the Indian right of occupancy, which could only be interfered with or determined by the United States. 314 U.S. at 345.

This policy of respecting Indian occupancy rights was "founded on the desire to maintain just and peaceable relations with the Indians." 314 U.S. at 346.

Tee-Hit-Ton makes clear that Indian occupancy of land without government recognition of ownership is not a constiutionally protected interest and therefore may be terminated by Congress at will without compensation. It follows that a claim of past interference with aboriginal use and occupancy is not a property interest and therefore such claim may also be terminated by Congress at will without compensation. Since the underlying interest (Indian use and occupancy) is not constitutionally protected, trespass or other claims of interference with the underlying interest likewise fall outside of constitutional protection.

This is not to say that Indians might never invoke judicial remedies in defense of a right of possession based on aboriginal use and occupancy. It would seem that in order to effectuate the United States' policy of protecting Indian occupancy against third party intrusion, Indians ought to have access to the courts to protect

possessory rights.[66] We are not now presented with that precise issue. Here, Congress has expressly extinguished any aboriginal possessory rights which the Alaska Natives may have had and all claims based on such possession, including damage claims for past interference with aboriginal use and occupancy. The question is whether Congress has the power to validate prior entries as it did in subsection 4(a) or to extinguish all aboriginal claims challenging such entries as it did in subsection 4(c) of the Settlement Act.

Intervenor in effect challenges the powers of Congress to retroactively extinguish aboriginal title and claims for pre-1971 entries on the North Slope. This challenge must fail. *Tee-Hit-Ton* and *Santa Fe* establish that Congress has plenary power over aboriginal use and occupancy and claims derived therefrom and may ex-

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[66] Edwardsen v. Morton, 369 F.Supp. 1359 (D.D.C. 1973) held that a claim of unrecognized aboriginal occupancy is sufficient to support a trespass claim against third parties. *Edwardsen*, however, was not an action by Indians against third parties. Limited to its facts, *Edwardsen* actually holds that the Eskimo plaintiffs had a cause of action against the defendant federal officials grounded on breach of the government's fiduciary duty to protect Native occupancy from third party intrusion. In cases where third parties have been sued for trespass to Indian land, the basis of the Indians' claim to land was more than mere unrecognized aboriginal title. For example, in United States v. Southern Pacific Transportation Co., 543 F.2d 676 (9th Cir. 1976), the occupancy rights of the Walker River Piute Tribe of Nevada (who sued in their own behalf in a companion case consolidated on appeal) were recognized in an Executive Order Reservation. Similarly, in United States v. Santa Fe Pacific R. Co., 314 U.S. 339 (1941), the Walapai Tribe had an executive order reservation at the time of suit. The tribe's trespass claims were upheld as to aboriginal lands within the reservation but were dismissed as to lands outside the reservation.

tinguish such occupancy rights and derivative claims in any manner it chooses.[67]

Indeed, it is essential that Congress be able to extinguish aboriginal title and all claims based on aboriginal title unimpeded by constitutional restrictions so that Indian land claims and the disputes generated by such claims may be conclusively and finally settled.

To hold, as intervenor urges, that Congress lacked the power to extinguish claims against the United States, the State and third parties for trespass to aboriginal lands in Alaska would mean that Congress is powerless to effect a final and comprehensive solution to the Native land claims problem in Alaska. It would mean the Settlement Act is illusory. The fact that Alaskan Natives petitioned Congress for a just and final settlement of their claims contradicts the claim now made that Congress was in fact limited in its authority to effect a final settlement.

On the authorities discussed, I conclude that Congress does have the power to effect a comprehensive and final settlement of the Native land claims issue by extinguishing all claims relating to aboriginal use and occupancy of land, including claims for past trespasses to Native occupied land. Section 4 of the Settlement Act in its entirety is constitutional.

V. CONCLUSION

The Settlement Act settled and extinguished *all* claims based on aboriginal title, use, and occupancy. Congress

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[67] Courts have affirmed the power of Congress to validate prior entries on aboriginal land and thereby retroactively extinguish aboriginal title and claims arising from those entries. United States v. Northern Piute Nation, 490 F.2d 954 (Ct. Cl. 1974); Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937).

meant to settle such disputes, was empowered by the Constitution to settle them, and did settle them.

Accordingly, defendants' motion to dismiss all claims for tortious interference with Natives use and occupancy of lands in Alaska is granted.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2014-71

[Filed Apr. 19, 1973]

CHARLES EDWARDSEN, JR., Individually and as Executive Director of the Arctic Slope Native Association, ET AL.,
Plaintiffs,

v.

ROGERS C. B. MORTON, Secretary of the United States Department of the Interior, and his successors and predecessors in Office, ET AL.,
Defendants.

MEMORANDUM-ORDER

This case came on for consideration on the defendants' motion for summary judgment and the entire record herein. Plaintiffs are certain Native villages on the Arctic Slope (also termed the North Slope) of Alaska, the Arctic Slope Native Association, the Inupiat Community of the Arctic Slope, and certain individual Inupiat Eskimos living in the region concerned. Defendants are Rogers C. B. Morton, the Secretary of Interior (hereafter called "the Secretary") and three other Department of Interior officers responsible for public lands management or Indian affairs at the time this action was brought, namely, Louis R. Bruce, Commissioner, Bureau of Indian Affairs; Harrison Loesch, Assistant Secretary for Public Land Management; and Burton Silcock, Director, Bureau of Land Management. The

successors and predecessors in office of the Secretary, Commissioner Bruce, and Assistant Secretary Loesch are also named as defendants.

The issues in this action are not susceptible of easy capsulization. At the risk of considerable oversimplification, plaintiffs' claims can be said to concern actions by defendants which allegedly violated plaintiffs' rights in Arctic Slope lands and waters by facilitating allegedly unlawful transfers of land to the State of Alaska and by issuing purported authorizations for third-party trespasses on the lands and waters in question. Plaintiffs have not moved for summary judgment because they properly believe issues of material fact must be resolved in their favor before the relief they request could be granted.

Defendants raise a number of defenses in their motion for summary judgment. Their principal defense is that plaintiffs never had rights of the kind alleged and even if they did, any suit based directly or indirectly on those asserted rights is barred by the Alaska Native Claims Settlement Act of 1971, 85 Stat. 688 (hereafter termed Settlement Act).

Interests of great importance are ultimately at stake in this action. Seen against the dark backdrop of this nation's often callous treatment of Native Americans, plaintiffs' claims are especially compelling. On the other hand, defendants rightly emphasize the desire of Congress to bring to an end a period of intolerable uncertainly about the potential impact of Native claims on land titles and mineral leases in Alaska.

I. *Background.*

The legal issues are more easily grasped if the history out of which they have arisen is at least briefly sketched in. The Arctic Slope of Alaska where the Inupiat Eskimos live was occupied by their ancestors for many hundreds

of years before them.[1] In this area they, like their ancestors, have sustained themselves by fishing, hunting, and trapping. When Alaska was acquired by the United States from Russia in 1867, the treaty, in unfortunate language, provided as follows:

> The inhabitants of the ceded territory, according to their choice, reserving their natural allegiance, may return to Russia within three years; but if they should prefer to remain in the ceded territory, they, with the exception of uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages, and immunities of citizens of the United States, and shall be maintained and protected in the free enjoyment of their liberty, property, and religion. The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.[2]

The United States, through Congress, did proceed to enact laws containing provisions that concerned the Alaskan Natives. Among other acts, it recognized the Natives' right not to be disturbed in the possession of lands they occupied until such time as Congress should act to extinguish their occupancy rights,[3] and it authorized the Secretary of Interior to issue deeds to

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[1] The area which plaintiffs claim that they and their ancestors have continuously used and occupied is described as follows: "[The Arctic Slope region] comprises a well-defined parcel of fifty-six and one-half million acres of land between the summit line of the Brooks Mountain Range and the shore of the Arctic Ocean, from north to south, and from the Canadian Border to Point Hope, from east to west." Amended Complaint, Paragraph III.

[2] Treaty of March 30, 1867, Art. III, 15 Stat. 539, 542.

[3] Organic Act of May 17, 1884, Sec. 8, 23 Stat. 24, 26.

Alaskan Natives for townsites under certain conditions.[4] However, no treaties were negotiated, and the creation of reservations, although authorized, was negligible. The lands involved in this action are not reservation lands.

In 1958, the admission of Alaska to the Union was accomplished by the enactment of the Alaska Statehood Act of July 7, 1958, 72 Stat. 339, as amended, 73 Stat. 141 (hereafter termed Statehood Act). The Statehood Act provided for selections by the State of over 100 million acres, to be chosen from public lands that were "vacant, unappropriated, and unreserved at the time of their selection." [5] Selections from public lands other than national forest lands required the approval of the Secretary of Interior, the officer with authority to patent such lands to the State.[6] Section 6(g) of the Act further provides: "Following the selection of lands by the State and the tentative approval of such selection by the Secretary of Interior or his designee, but prior to the issuance of the final patent, the State is hereby authorized to execute conditional leases and to make conditional sales of such selected lands." [7] The Act also contained a provision, Section 4, which the legislative history indicates was intended to maintain the status quo as to Native property rights until Congress should act further on the matter.[8]

During the 1960's, the State made selections of large areas of land in, among other places, the Arctic Slope of Alaska, a region in which the existence of large oil

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[4] Act of May 17, 1926, 44 Stat. 629, Part 2, ch. 379.

[5] Sections 6(a) and 6(b) of the Statehood Act, 72 Stat. 339, 340.

[6] Sections 6(a) and 6(g), 72 Stat. 339, 340-41.

[7] 72 Stat. 339, 342.

[8] 72 Stat. 339.

deposits had been suspected. During this same period, protests from various Alaskan Native organizations were mounting in the face of State selections of land in which the Natives claimed rights they believed to be inconsistent with valid State selections. The proportion of the State land area affected by these protests was great. Thus, a report issued in 1968 by the Federal Field Committee for Development Planning in Alaska indicated that of 272 million acres in the public domain, Alaskan Natives had claimed title, based on continuous use and occupancy, to 250 million acres; and of 12 million acres "in the process of selection by State under the terms of the Statehood Act," Alaskan Natives claimed all but 100,000 acres.[9] In the Arctic Slope Area, which is the subject of the action herein, exhibits filed by plaintiffs indicate that Native claims covered virtually the entire region.[10]

Partly in response to such protests, an informal land freeze was instituted by Secretary of Interior Udall late in 1966; issuances of mineral leases on federal lands and approvals or tentative approvals of State selections were suspended pending Congressional determination of Native land rights.[11] Large areas of land had been selected

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[9] *Alaskan Natives and the Land,* 536 (GPO, 1968). The Field Committee was commissioned by Senator Jackson, Chairman of the Senate Interior and Insular Affairs Committee, to study the Native claims problem. The report just cited is a part of the legislative history of the Settlement Act, S. Rep. No. 92-405, 92d Cong., 1st Sess. 73-74 (1971).

[10] Copies of letters of protest filed in 1966 by an attorney, William Paul, on behalf of Arctic Slope Natives and of a letter dated April 7, 1966, from defendant Burton W. Silcock, Director of the Bureau of Land Management, to the BLM director for Alaska, are attached as exhibits to the Amended Complaint.

[11] The freeze was made official in Public Land Order No. 4582, issued January 17, 1969, which reads as follows:

by the State before the freeze, however, and reports of oil deposits in one area selected—the Prudhoe Bay region on the Arctic Slope—were confirmed in 1968. The Secretary had given tentative approval to selections in this area, and the State moved quickly to exploit its good fortune, executing a sale of leases to oil companies in 1969 for a price in excess of 900 million dollars.

In the meantime there was a movement in Congress to enact legislation which would end the uncertainty about the nature and extent of Native rights in land already selected by the State and land which the State might wish to select upon the termination of the freeze. Finally, in 1971, in order to provide "a fair, just, and final settlement of all land claims of Alaskan Natives, Native villages, and groups," Congress passed the Settlement Act.[12] As will be apparent from the discussion below of

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Subject to valid existing rights, and subject to the conditions hereinafter set forth, all public lands in Alaska which are unreserved or which would otherwise become unreserved prior to the expiration of this order, are hereby withdrawn from all forms of appropriation and disposition under the public land laws (except locations for metalliferous minerals), including selection by the State of Alaska pursuant to the Alaska Statehood Act (72 Stat. 339), and from leasing under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437; 30 U.S.C. 181, *et seq.*), as amended, and reserved under the jurisdiction of the Secretary of the Interior for the determination and protection of the rights of the Native Aleuts, Eskimos, and Indians of Alaska. The withdrawal and reservation created by this order shall expire at 12 p.m. (midnight), prevailing A.s.t., December 31, 1970.

[12] Plaintiffs believe the terms of this Act to be unfair to them unless the Act is interpreted to allow them to choose from certain lands previously selected by Alaska. Whether or not the Court agrees with them on the relative fairness of

the legal issues, defendants believe that this Act effecitvely bars all of plaintiffs' claims; and plaintiffs contend not only that the Act does not bar their claims but that it enables them to select large sections of the oil-rich lands on the Arctic Slope which had previously been transferred to Alaska.[13]

II. *Plaintiffs' Claims.*

Plaintiffs' claims fall into two main categories: (1) challenges to the validity of certain titles to land and interests in leasable minerals, which allegedly rest on unlawful acts by the defendants; and (2) claims for compensation for alleged trespasses by third parties who, it is asserted, entered plaintiffs' lands under color of the allegedly invalid titles or of permits, licenses, and the like unlawfully issued by defendants. As subsequent discussion will reveal, defendants' summary judgment motion is sufficient to defeat some, but not all, of plaintiffs' claims. For that reason it is necessary to review the claims in some detail. To clarify the theories of the Amended Complaint, the Court will, in the following discussion, be drawing on plaintiffs' brief in opposition to the defendants' motion.

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the Act is, however, immaterial since the settlement incorporated in the Act represents a political judgment with which this Court may not interfere. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 291 (1955); *United States as Guardian of the Hualpai Indians of Arizona* v. *Santa Fe Pacific Railroad Co.*, 314 U.S. 339, 347 (1941).

[13] This claim based on the Settlement Act itself was not made in plaintiffs' Amended Complaint so it is not discussed in the following section setting forth plaintiffs' claims. It was first raised in plaintiffs' opposition to defendants' motion for summary judgment, and is more in the nature of an asserted consequence of plaintiffs' claims, if successful.

It is necessary at the outset to define Native land rights as plaintiffs see them before reviewing plaintiffs' theories regarding the ways in which defendants have allegedly violated these rights. Plaintiffs claim that by ancient authority Native Americans have enjoyed exclusive possessory rights in their aboriginal lands even after the European conquest of America. Plaintiffs cite the early cases of *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.), 543 (1823), and *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832), and a long succession of later cases as demonstrating that these rights—sometimes referred to as "aboriginal title" or "Indian title"—are based simply on continued use and occupancy of lands, and can be extinguished only by Congressional action. Plaintiffs contend further that even though aboriginal title does not, in their view, depend on Congressional recognition for its validity, *Cramer* v. *United States*, 261 U.S. 219, 229 (1923), such recognition does exist in the case of the Arctic Slope lands they have claimed. One of the alleged manifestations of Congressional recognition is Section 8 of the Organic Act of May 17, 1884, 23 Stat. 24, 26, which provides:

> That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. . . . [T]he Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress.

Another Congressional enactment which plaintiffs see as recognition of the rights they claim is Section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, which provides: "The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation. . . ."

However, the act of alleged Congressional recognition on which plaintiffs place the most weight is Section 4 of the Statehood Act, which, as amended in 1959, 73 Stat. 141, reads:

> SEC. 4. As a compact with the United States said State and its people do agree and declare that they forever disclaim all right and title to any lands or other property not granted or confirmed to the State or its political subdivisions by or under the authority of this Act, the right or title to which is held by the United States or is subject to disposition by the United States, and to any lands or other property (including fishing rights), the right or title to which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives) or is held by the United States in trust for said natives; that all such lands or other property (including fishing rights), the right or title to which may be held by said natives or is held by the United States in trust for said natives shall be and remain under the absolute jurisdiction and control of the United States until disposed of under its authority, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation: *Provided*, That nothing contained in this Act shall recognize, deny, enlarge, impair, or otherwise affect any claim against the United States, and any such claims shall be governed by the laws of the United States applicable thereto; and nothing in this Act is intended or shall be construed as a finding, interpretation, or construction by the Congress that any law applicable thereto authorizes, establishes, recognizes, or confirms the validity or invalidity of any such claim, and the determination of the applicability or effect of any law to any such claim shall be unaffected by anything in this Act: *And provided further*, That

> no taxes shall be imposed by said State upon any lands or other property now owned or hereafter acquired by the United States or which, as hereinabove set forth, may belong to said natives, except to such extent as the Congress has prescribed or may hereafter prescribe, and except when held by individual natives in fee without restrictions on alienation.[14]

These rights which plaintiffs contend are based on use and occupancy and strengthened by Congressional recognition are said to include the right to exclude all parties except those whose entry is authorized by Congress and the ownership of a beneficial interest in all exploitable resources such as timber and minerals. On the latter point they cite *United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938), and *The Tlingit and Haida Indians of Alaska* v. *United States*, 389 F.2d 778 (Ct. Cl. 1968).

Given the existence of these rights, plaintiffs assert that title to the land selections made by Alaska, pursuant to the Statehood Act, in the Arctic Slope region never rightfully passed, even provisionally, to the State. According to Section 6 of the Act, such selections could be made only from lands that were "vacant, unappropriated, and unreserved at the time of their selection," and the Secretary of Interior could give his approval only to selections meeting these criteria. Insofar as the Secretary tentatively approved selections of lands in which plain-

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[14] In the section as originally enacted, the "absolute jurisdiction and control" provision appeared to apply to lands held by the United States in its own right as well as to those held by or in trust for the natives. The language was changed to take lands held by the United States which were free of native claims out from under the provision. The change was made at the instance of the Bureau of the Budget. See letter of March 24, 1959, from Maurice Stans, Budget Director, to Richard M. Nixon, President of the Senate, printed in S. Rep. No. 331, 86th Cong., 1st Sess., 24-26 (1959).

tiffs possessed rights based on aboriginal title, such approvals were void *ab initio*, plaintiffs assert. Moreover, they contend, the oil leases sold by Alaska on Arctic Slope lands at a price of approximately 912 million dollars were similarly void because, under Section 6(g) of the Statehood Act, tentative approval by the Secretary of the selections of land on which leases were conditionally sold, was a prerequisite for the sales.

In addition, plaintiffs allege that all tentative approvals by the Secretary of Arctic Slope selections violated the Secretary's fiduciary duty to protect the interests of Native Americans, whose welfare is a federal trust responsibility,[15] and that the approvals violated certain Department of Interior regulations. In particular, it is alleged that the Secretary violated the following regulations: 43 C.F.R. § 2091.6-3 (1972), providing that "Lands occupied by Indians, Aleuts, and Eskimos in good faith are not subject to entry or appropriation by others"; [16] and 43 C.F.R. § 2091.5 providing that

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[15] Plaintiffs cite *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1 (1831), as the "classic expression" of the government's duty to Indian tribes, and they argue that Alaskan Natives are owed this duty also by virtue of "[a] course of executive dealings and congressional enactments," including the Organic Act of May 17, 1884, 23 Stat. 24, and the Act of June 6, 1900, 31 Stat. 321. Cases cited as recognizing this duty to Alaskan Natives include *Alaskan Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918), and *Territory of Alaska* v. *Annette Island Packing Co.*, 289 F. 671 (9th Cir. 1923), *cert. denied* 263 U.S. 708 (1923). Plaintiffs also cite authority for the proposition that "the most exacting fiduciary standards" must be used in scrutinizing federal management of Indian property. *Seminole Nation* v. *United States*, 316 U.S. 286, 297 (1942); *Navaho Tribe* v. *United States*, 364 F.2d 320 (Ct. Cl. 1966).

[16] Plaintiffs note that this regulation has existed in its present form since December 15, 1958.

> Managers will ascertain by any means in their power whether any public lands in their districts are occupied by Indians and the location of their improvements, and will suspend all applications made by others than the Indian occupants, upon lands in the possession of Indians who have made improvements of any value whatever thereon.

Finally, it is claimed that the Secretary's tentative approvals were void because they were granted in violation of plaintiffs' rights to due process under the Administrative Procedure Act, 5 U.S.C. §§ 551-59 (1967), and the Fifth Amendment. In particular it is asserted that they did not receive adequate notice of the approval proceedings, an adequate opportunity to make their claims known, or an opportunity to be represented by counsel at a fair hearing, even though the approvals affected interests of great importance to them.

In making their claims arising from alleged trespasses on their lands, plaintiffs challenge not only the tentative approvals of land selections and leases sold thereunder but also various land use permits, licenses, and other authorizations issued by the Secretary or other defendants which, plaintiffs assert, purported to authorize the entry of third parties on lands and waters used or occupied by plaintiffs. Specifically it is alleged that the issuance of such authorizations to oil companies, construction companies, and others led to "acts of waste, trespass, and destruction" on plaintiffs' lands, including takings of gravel, desecration of graveyards where plaintiffs' ancestors lay buried, and reduction of plaintiffs' annual whale catch. (The damage to the whale catch was allegedly inflicted in 1970, when certain third parties, acting under licenses granted by the Department of Interior, conducted onshore and offshore seismic blasting in the vicinity of Icy Cape and Wainwright Village.)

In their prayer for relief for all of the unlawful activities alleged in the Amended Complaint, plaintiffs ask that this Court declare void all selections by Alaska in the North Slope region and all tentative approvals of such selections on the ground that they violate the various statutes, regulations, and duties listed in the Amended Complaint. They further seek a judgment declaring void "all rights, interests, leases, permits, or permissive occupancies issued in the North Slope region to any party by the Secretary of the Interior or by any other person under his jurisdiction." Prospective relief is also sought; plaintiffs ask that the Court enjoin the Secretary "from issuing any patents or further leases or permits on any North Slope lands" and "from granting tentative approval to any land selections by the State of Alaska in the Arctic Slope region." Plaintiffs also ask that the Court order the Secretary of Interior, "as trustee and guardian of plaintiffs" "to cause an accounting to be made and a money judgment to be paid plaintiffs for all monies received by the State of Alaska and other third persons" as a result of the allegedly unlawful approvals of State selections. For the acts of waste and trespass alleged, plaintiffs seek a money judgment. Finally, such other relief as this Court deems proper is requested.

III. *Defendants' Motion for Summary Judgment.*

Although they dispute plaintiffs' contentions that Alaskan Natives ever had any "recognized" legal interest in the lands claimed in the Arctic Slope region, defendants' principal defense is that the Settlement Act bars all claims raised in this action, and that the Supreme Court opinion in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272 (1955), is authority for the constitutionality of such action by Congress.

Defendants assert that the Settlement Act was intended by Congress to settle the conflicts generated by the filing

of protests against State land selections and that successful maintenance of this action by plaintiffs would defeat that purpose. Specifically, they cite Section 4 of the Act, 85 Stat. 688, 689-90, as conclusively extinguishing all claims asserted in the present action. Section 4 provides as follows:

> SEC. 4.(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> (b) All aboriginal titles, if any, and claims of aboriginal title in Alaska based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist, are hereby extinguished.
>
> (c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished.

Defendants point to Section 4(a) as a conclusive refutation of plainitffs' claims that the Secretary's tentative approvals of State land selections in the North Slope area are void. They contend further that the sweeping language of Section 4(c) effectively extinguishes all claims in this action because all such claims are "based on

claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska."

Such extinction of plaintiffs' claims violates none of their Constitutional rights, defendants further contend, because the Supreme Court has held that the right of Alaskan Indians in land claimed on the basis of aboriginal title, i.e., use and occupancy, is merely "a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians." *Tee-Hit-Ton Indians*, 348 U.S. at 279. Defendants assert that nevertheless the Settlement Act makes "generous provision" in the form of money, mineral royalties, and fee simple title to land in certain designated regions for all Alaskan Natives, including plaintiffs.[17]

In addition to their contentions based on the Settlement Act, defendants also raise the defenses of failure to exhaust administrative remedies, *laches*, the absence of indispensable parties, sovereign immunity, and lack of subject matter jurisdiction. In raising the defense of *laches*, defendants ask that this Court take judicial notice of an affidavit filed in *Native Village of Allakaket, et al.* v. *Hickel*, Civil Action No. 706-70 in this Court,[18] which shows that, beginning in 1968, "numerous third parties," acting under permits issued by defendants have spent large sums of money on surveying and construction on lands in which plaintiffs are claiming superior rights. These activities were well known, defendants contend,

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[17] As previously indicated, note 12, *supra*, the Court lacks jurisdiction to inquire into the fairness of the settlement.

[18] Affidavit of Edgar W. Wellbaum, Vice-President of B. P. Alaska, Inc. A copy is attached as Exhibit A to defendants' motion for summary judgment.

and plaintiffs are thus estopped from maintaining this action, having "waited too long in these circumstances."

In contending that this Court lacks jurisdiction to grant the relief requested by plaintiffs because of the absence of indispensable parties, defendants ask that judicial notice be taken of the pleadings in certain other cases filed in this Court.[19] They assert that those pleadings show that both the State of Alaska and the Alyeska Pipeline Service Co. (successor to various oil companies which had received special land use permits from defendants) assert rights in the lands claimed by plaintiffs in this action; hence, defendants argue, the Court cannot grant the requested relief in this action without prejudicing the interests of these absent parties.[20]

In raising their sovereign immunity defense, defendants contend that, although this suit is ostensibly against certain officers in the Department of Interior, the relief requested would in effect be charged against the United States, which, defendants allege, has not consented to this suit. They point out that plaintiffs' prayer asks that

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[19] These cases are *Wilderness Society, et al.* v. *Morton,* Civil Action No. 928-70, and *Cordova District Fisheries Union* v. *Morton, et al.,* Civil Action No. 861-71. Copies of the pleadings are attached to defendants' motion as Exhibits B through I.

[20] The cases cited in Note 19 were consolidated for trial, and the District Court Judge dissolved preliminary injunctions enjoining the Secretary of Interior from granting such permits, denied permanent injunctions, and dismissed the complaints. On appeal it was held that permits granting a right-of-way in excess of 54 feet for pipe-line construction purposes were void under the Mineral Leasing Act of 1920, 30 U.S.C. § 185 (1970). *Wilderness Society, et al.* v. *Morton, et al.,* Nos. 72-1796, 72-1797, and 72-1798 (U.S. App. D.C., February 9, 1973).

certain land now owned by the United States be recognized as belonging to them and that a money judgment be awarded which would be a charge on the United States treasury. As authority for the proposition that such a suit cannot be maintained, defendants cite *Dugan* v. *Rank*, 372 U.S. 609 (1963); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); and *Mine Safety Appliances Co.* v. *Forrestal*, 326 U.S. 371 (1945). Defendants also point out that the Settlement Act itself cannot be taken as giving consent to the action herein because Section 2(f) of that Act states:

> [N]o provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this Act. . . .

In none of the grounds for their motion do the defendants distinguish between plaintiffs' direct challenges to title and their claims based on alleged trespasses.

IV. *Issues Presented.*

Resolution of the issues raised by defendants' motion and plaintiffs' opposition thereto requires (1) an examination of the nature of Alaskan Native land rights based on use and occupancy; (2) analysis of key provisions of the Statehood Act to determine its effect, if any, on those rights and the validity of the challenged approvals prior to passage of the Settlement Act; (3) a review of defendants' fiduciary duties to protect plaintiffs, applicable administrative regulations, and due process guarantees; (4) a determination of the effect of the Settlement Act on plaintiffs' claims; (5) consideration of Fifth Amendment constraints on the power of Congress to extinguish plaintiffs' claims; and (6) a determination of the

merits of defendants' defenses of failure to exhaust administrative remedies, *laches*, absence of indispensable parties, sovereign immunity, and lack of subject matter jurisdiction.

V. *Nature of Plaintiffs' Possessory Rights.*

To determine the nature of plaintiffs' possessory rights in the lands claimed by them, the Court must look primarily to the case of *Tee-Hit-Ton Indians* v. *United States*, *supra*, the most recent pronouncement by the Supreme Court on the rights of Alaskan Natives in lands claimed on the basis of long-term use and occupancy.[21] *Tee-Hit-Ton* concerned the right, if any, of the Tee-Hit-Ton Indians to compensation by the United States for timber taken from lands claimed by the Indians on the basis of the same kind of use and occupancy as alleged

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[21] In their contentions regarding rights based on use and occupancy, or aboriginal title, plaintiffs seek to rely in part on *United States* v. *Alcea Band of Tillamooks*, 329 U.S. 40 (1946), the so-called "First Tillamooks decision. There the Supreme Court held that the plaintiff Indians should be compensated for land held by "original Indian title" which was taken from them by the government. However, in *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48 (1951) (the "Second Tillamooks decision"), in which the Court held that no interest should be paid on the amount of compensation awarded, it was specifically noted that the recovery ordered in the earlier decision was *not* "grounded on a taking under the Fifth Amendment." 341 U.S. at 49. In *Tee-Hit-Ton*, the Court reaffirmed this interpretation of the earlier decision, noting that compensation to the Tillamooks was based "upon a statutory direction to pay for the aboriginal title in the special jurisdictional act to equalize the Tillamooks with the neighboring tribes. . . ." 348 U.S. at 284. This Court cannot substitute its judgment for that of the Supreme Court in determining how the "First Tillamooks" decision should be read.

by plaintiffs herein. (The timber was sold by the Secretary of Agriculture under statutory authorization to negotiate contracts for such sales.) As in the instant case, Section 8 of the Organic Act for Alaska of May 17, 1884, 23 Stat. 24, 26, and Section 27 of the Act of June 6, 1900, 31 Stat. 321, 330, were cited as constituting Congressional recognition of Alaskan Native land rights. The Court held that what the Tee-Hit-Ton Indians had was "original Indian title," which "means mere possession not specifically recognized as ownership by Congress." 348 U.S. at 279. (The Court had found that neither of the Congressional acts cited by the plaintiff Indians constituted recognition of ownership.) Moreover, the possession enjoyed by the Indians was held to be subject entirely to the will of the sovereign:

> This is not a property right but amounts to a right of occupancy which the sovereign grants and protects against intrusion by third parties but which right of occupancy may be terminated and such lands fully disposed of by the sovereign itself without any legally enforceable obligation to compensate the Indians. 348 U.S. at 279.
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> * * * *
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> . . . Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States protected by the Fifth Amendment or any other principle of law. 348 U.S. at 285.

However, although Native possessory rights are thus vulnerable to uncompensated extinction, it is clear from the opinion in *Tee-Hit-Ton* and earlier relevant cases that *only Congress* may extinguish such rights. 348 U.S. at 281; *United States as Guardian of the Hualpai Indians of Arizona* v. *Santa Fe Pacific Railroad Co.* (hereafter cited Walapai Tribe), 314 U.S. 339, 351 (1941); *Cramer* v. *United States*, 261 U.S. 219, 234 (1923).

Until Congress acts to extinguish them, these rights to occupancy safeguarded from intrusion by third parties remain intact as an encumbrance on the fee (*Walapai Tribe*, at 347); and until an authorized transfer of title takes place, the fee remains in the United States. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. at 279; *Buttz* v. *Northern Pacific Railroad*, 119 U.S. 55, 66 (1886); *Beecher* v. *Wetherby*, 95 U.S. (5 Otto) 517, 525 (1877).

Thus, until Congress has acted to extinguish Native title in land claimed on the basis of use and occupancy, any third parties coming onto the land without consent of those rightfully in possession are mere trespassers. This status is unaffected by any mistaken belief on the part of the intruders that they are entitled to enter the land, so long as such a belief is not induced by those in possession of the land. RESTATEMENT OF TORTS 2d, § 164 (1965). Neither can such intruders escape liability by asserting that officers of the United States gave them permission, so long as those officers lacked the necessary statutory authority. *Cramer* v. *United States*, 261 U.S. 219, 234 (1923). Indeed, the officers are themselves liable in trespass if their actions caused third parties to enter the land. RESTATEMENT OF TORTS 2d, § 158, comment j at 279 (1965). But resort to that principle of tort law actually is unnecessary in view of the fiduciary duty of the federal government and its agents to protect the interests of Native Americans.[22]

Although it is premature at this stage of the instant case to determine what would be the proper measure of damages where trespass allegations such as those made by plaintiffs are proven, two points should be made. The *Tee-Hit-Ton* Court's characterization of Native rights as being those of "mere possession" as opposed to "ownership" should not preclude Natives from maintaining an

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[22] See discussion in Section VII below.

ordinary tort action for trespass to land and suing for the recovery of, *inter alia*, the value of any resources actually extracted from Native lands by trespassing third parties.[23] The *Tee-Hit-Ton* Court did, it is true, retreat from the sweeping language of some earlier cases, notably *Walapai Tribe*, *supra*,[24] but nothing in *Tee-Hit-Ton* sug-

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[23] The standard damages rule in actions for trespass to land permits recovery for any physical harm done to the possessors of the land, the land itself, and anything thereon. Even when no physical harm is done, nominal damages at least are recoverable. In some cases, punitive damages can be awarded in addition to compensatory or nominal damages. RESTATEMENT OF TORTS 2d, §§ 162-63 (1965). The Court is, of course, aware of the fact that Native use and occupancy rights are in some respects *sui generis*, and cannot always be fully accommodated within the traditional structure of common law doctrine in the areas of tort and real property. However, if the protection against intrusion which the *Tee-Hit-Ton* Court recognizes is to mean anything, it surely must mean that Natives have the right to prevent their lands from being mined or otherwise wasted by unauthorized third parties and to recover damages if such waste occurs.

[24] In *Walapai Tribe*, the Supreme Court allowed the United States, as guardian of the Walapai Indians, to seek on their behalf an accounting for "rents, issues, and profits" derived from leasing and use of lands which had been claimed and entered by the Santa Fe Pacific Railroad Co., 314 U.S. 339, 344, 360 (1941). The Court made no real distinction between ownership and possessory rights and clearly took a broader view of use and occupancy rights than did the *Tee-Hit-Ton* Court, which held that the Indian right of use and occupancy was "not a property right." It should perhaps be noted that, although the Court in *Walapai Tribe* stated that Indian occupancy rights as it defined them required no recognition by statute or treaty, the accounting was ordered only as to lands within a reserva-

gests that Natives could not recover for actual extraction of, e.g., sand and gravel, from their lands by unauthorized third parties even if the United States can be said to hold the title to all realty, including minerals in place. Such extraction would clearly involve a physical invasion of lands and would thus violate Native rights to undisturbed use and occupancy.

On the other hand, the *Tee-Hit-Ton* Court cited *Johnson* v. *McIntosh*, 21 U.S. (8 Wheat.) 543 (1823), for the proposition that Natives holding land on the basis of aboriginal use and occupancy have no *alienable* interest in such land. 348 U.S. at 279-80. Thus such Natives could not themselves sell interests in the land or its resources to third parties,[25] and it does not appear, therefore, that they could have any legal interest in money received for the sale of *property rights* such as mineral leases.[26] Native possessory rights as defined by the *Tee-*

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tion, the Court having determined that the Walapais had relinquished claims to other aboriginal lands by moving onto the reservation. 314 U.S. at 357-58.

[25] See, e.g., *United States* v. *Cook*, 86 U.S. (19 Wall.) 591 (1873), in which it was held that when certain Indians of the Oneida tribe cut timber standing on lands "held as other Indian lands are held," and sold the logs to one Cook, the United States, as owner of the fee, could recover the logs from Cook in an action for replevin. Chief Justice Waite, speaking for an unanimous Court, observed: "The timber while standing is a part of the realty, and it can only be sold as the land could be. The land cannot be sold by the Indians, and consequently the timber until rightfully severed cannot be. It can be rightfully severed for the purpose of improving the land, or the better adapting it to convenient occupation, but for no other purpose." 86 U.S. at 593.

[26] Two cases are cited by plaintiffs for the proposition that Indian possessory rights include "every element of

Hit-Ton Court guarantee the occupants protection from intrusions rather than a share in vendable interests in the lands. As will be apparent from the discussion in Section VIII below, the claims which survive the defendants' motion for summary judgment herein all relate to trespasses, i.e., unauthorized physical intrusions, occurring before passage of the Settlement Act in 1971 and not to interests in property rights transferred or, sold in the lands involved.

To summarize the discussion in this section, it appears that, leaving aside for the moment the effect of the Statehood Act and the Settlement Act on plaintiffs' claims, plaintiffs' rights based on aboriginal title are rights to undisturbed use and occupancy. These rights entitle the holders to protection against all manner of physical intrusions into their lands, but they do not include ownership of alienable interests in exploitable resources such

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value that would accrue to a non-Indian land owner," but neither is on point to the instant case. In *The Tlinget and Haida Indians of Alaska* v. *United States*, 389 F.2d 778 (1968), the Court of Claims allowed the plaintiffs to recover the value of their land taken by the United States according to "the same standard of valuation" which would be used had the land been held by "fee simple ownership." 389 F.2d at 782. However, the *Tlinget* suit was brought under a special jurisdictional statute which permitted the plaintiffs to sue for the taking of their lands by the United States. The other case relied on by plaintiffs herein (and by the *Tlinget* Court) is *United States* v. *Shoshone Tribe*, 304 U.S. 111 (1938). There the Supreme Court was construing a treaty in which the United States had agreed to set aside a particular area for a reservation. The Court noted: "The treaty, though made with knowledge that there were mineral deposits and standing timber in the reservation, contains nothing to suggest that the United States intended to *retain* for itself any beneficial interest in them" (emphasis added). 304 U.S. at 117.

as oil and gas. These use and occupancy rights can be extinguished only by the United States acting through Congress, and until they are thus extinguished they remain as an encumbrance on the fee regardless of who holds it. Congress may also, of course, act to expand Native rights beyond those enjoyed on the basis of use and occupancy alone. To determine what Congress has done in the crucial pieces of legislation bearing on this action, the Court will turn next to an examination of the Statehood Act.

V. *The Statehood Act.*

The key provisions of the Statehood Act, Sections 4 and 6, have been set out above in pertinent part.[27] The first question to be answered is whether Section 4 granted plaintiffs and others similarly situated rights beyond those based on aboriginal title as defined in *Tee-Hit-Ton Indians* v. *United States*, *supra*. In Section 4, Alaska, in a compact with the United States, agrees to "disclaim any right or title" in lands held by the Natives or held in trust for them by the United States. It is clear from the language of the first proviso of Section 4 and from explanations of that language in the relevant House and Senate reports that Congress did not intend by this section either to enlarge or to diminish Native possessory rights existing at the time the Statehood Act was passed. Both reports note that the question of Native claims is to be left in "status quo" for future legislative or judicial determinations.[28] Thus the rights of plaintiffs or other Natives claiming lands on the basis of aboriginal title remained those rights of occupancy described in *Tee-Hit-Ton*.

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[27] See pertinent parts of Section 6 quoted, *supra*, p. 4; Section 4 is set forth, *supra*, pp. 9-10.

[28] *See* S. Rep. No. 1163, 85th Cong., 1st Sess. 15 (1957); H.R. Rep. No. 624, 85th Cong., 1st Sess. 2 (1957).

The next question is whether, despite the preservation of Native possessory rights provided for in Section 4, Alaska was free, under Sections 6(a) and 6(b), to select lands in which such rights existed, and whether the Secretary of Interior could properly grant tentative approval to the selections so as to permit the State to negotiate conditional sales and leases as provided for in Section 6(g). Resolution of this question requires the Court to determine whether lands in which Natives had possessory rights were "vacant, unappropriated, and unreserved," since the State was restricted to such lands in making its selections.

The Court cannot rest on the plain meaning argument advanced by plaintiffs in determining what is meant by "vacant, unappropriated, and unreserved," since as the Court of Appeals for this circuit recently observed:

> On occasion we have paid lip service to the rule that where the language of a statute is clear and unambiguous on its face it cannot be controverted by seeking to show inconsistent legislative intent, *see Sea-Land Service, Inc.* v. *F.M.C.*, 131 U.S.App.D.C. 246, 250, 404 F.2d 824, 828 (1968), but we have also faced up to the reality that "the 'plain meaning' doctrine has always been subservient to a truly discernible legislative purpose however discerned," *District of Columbia* v. *Orleans*, 132 U.S.App.D.C. 139, 141, 406 F.2d 957, 959 (1968).[29]

However, the legislative history of Sections 4 and 6 of the Statehood Act suggests that plaintiffs are correct in their contention that land which Natives possessed on the basis of use and occupancy could not be "vacant, un-

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[29] *Wilderness Society, et al.* v. *Morton, et al.*, Nos. 72-1796, 72-1797, 72-1798 (U.S.App.D.C., February 9, 1973), slip op. at 22.

appropriated, and unreserved," so as to make it available for State selection under the Act. It is true that Congress apparently did not anticipate the filing of Native possessory claims covering the major part of the Alaskan land area in which the State could be expected to make a good portion of its selections. Indeed, it is fair to say that the views of Congress on how the authorization for State selection of more than 100 million acres of land could be reconciled with preservation of Native possessory rights based on aboriginal title were so obscure as scarcely to rise to the dignity of intent. Nevertheless, if Section 4 of the Act is to have any real significance at all, it would have to be construed as barring approvals by the Secretary which would result in transferring out of "the absolute jurisdiction and control of the United States" any lands "the right or title to which" was held by Alaskan Natives or held by the United States for such Natives. It is important to note that the phrase "absolute jurisdiction and control" did not slip into the Act unnoticed. The Senate Committee on Interior and Insular Affairs, when it was considering an early version of the Statehood Act, struck the words "jurisdiction and" for the reason that:

> . . . 'absolute jurisdiction' is a term of art describing a status of authority which is not presently exercised by the United States over Indian lands within the United States. The bill in its present form does not and is not intended to change or affect the laws of the United States relating to jurisdiction over Indian or native lands.[30]

Despite these reservations of the Senate Committee, the language was restored in the bill which was finally en-

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[30] S. Rep. No. 1163, 85th Cong., 1st Sess., 15 (1957).

acted.[31] The Court also notes the clear intent of Congress to reserve for either future legislative action or judicial determination the matter of indigenous rights.[32] It is hard to see how these rights could remain for legislative or judicial determination if lands in which such rights existed could be transferred, even tentatively, to State control at the stroke of the Secretary's pen.[33]

The construction of the Statehood Act which plaintiffs urge is, moreover, supported by relatively recent authority in another circuit. *State of Alaska* v. *Udall*, 420 F.2d 938 (9th Cir. 1969). In that case, a Ninth Circuit panel reversed a District Court decision granting summary judgment in favor of the State of Alaska, which was seeking to compel Secretary Udall "to issue a patent and grant tentative approval to certain lands selected by the state pursuant to Section 6(b) of the Alaska Statehood Act." Circuit Judge Hamley, speaking for the panel, held that summary judgment was inappropriate since there were genuine issues of material fact as to whether Native intervenors, who claimed possessory rights in the

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[31] The later amendment of this Section to take lands held by the United States in its own right out from under the "jurisdiction and control" provision also indicates that this language was meant to have more than merely symbolic significance. See Note 14, *supra*.

[32] See Note 28, *supra*.

[33] Congress could, of course, have authorized a transfer of title to the State with a promise that it would act as rapidly as practicable to extinguish all possessory rights therein so as to free the State title of the encumbrance. *Buttz* v. *Northern Pacific Railroad*, 119 U.S. 55 (1886). There is, however, no language similar to that which was before the Court in *Buttz* to indicate such an intent. Failure to adopt this strategy did not, of course, preclude Congress from later deciding to extinguish aboriginal title in certain lands retroactively. See discussion in Section VIII below.

lands concerned, actually used and occupied these lands or had done so in the past. Circuit Judge Hamley stated that the panel was "unwilling" to hold "that under no circumstances could Indian trapping, hunting, and camping . . . constitute a condition which would deprive the selected lands of the status of being 'vacant, unappropriated, and unreserved.' " 420 F.2d at 940.

To summarize, the Statehood Act, read as a whole and read in the light of a legislative history showing an intent on the part of Congress to avoid any prejudice to Native possessory rights until such time as Congress should determine how to deal with them, did not authorize the State to select lands in which Natives could prove aboriginal rights based on use and occupancy. Accordingly, tentative approvals by the Secretary of Interior of land selections in which such rights can be proven were void at the time they were granted. However, Native possessory rights were in no way expanded or given formal recognition in the Act, so that they remained in the status described above in Section V.

VII. *The Federal Fiduciary Duty, Department of Interior Regulations, and Due Process.*

Plaintiffs have also charged defendants with violating their duties pursuant to the federal trust responsibility for Native Americans, various departmental regulations apparently devised to protect Native occupancy rights, and due process guarantees embodied in the Administrative Procedure Act, 5 U.S.C. §§ 551-59, and in the Fifth Amendment. For the reasons given in the discussion following, the Court finds that summary judgment in favor of defendants as to all of these claims would be improper.

There are clearly issues of fact as to whether the possessory rights claimed in this action existed at the time

various violations alleged by plaintiffs occurred, if they did occur. Summary judgment in favor of defendants would be appropriate only if the Settlement Act were found to extinguish all the causes of action alleged, including those for alleged trespasses, or if it could be shown that the federal trust responsibility, the cited Department of Interior regulations, and the Constitutional and statutory due process guarantees offered no protection to plaintiffs in their enjoyment of possessory rights in aboriginal lands. The effect of the Settlement Act is discussed in Section VIII below. At this point, what the Court must determine is whether plaintiffs, assuming they can prove their factual claims, enjoyed all the protections cited above, at least until the Settlement Act extinguished aboriginal title in Alaskan lands.

As to the alleged fiduciary obligation imposed on the federal government to protect the interests of Native Americans, a lengthy examination of cases cited by plaintiffs is unnecessary. Whether or not cases concerning Indian lands in the "lower 48" are on point, it is clear from the Supreme Court's opinion in *Tee-Hit-Ton*, *supra*, that federal officers are obligated to protect aboriginal lands "against intrusion by third parties" until such time as Congress acts ot extinguish possessory rights therein. 348 U.S. at 279. It is difficult to see how transferring lands out of federal jurisdiction and control could be consistent with carrying out this duty of protection.

Defendants' possible breach of their duty of protection is even plainer where the direct issuance to third parties of special land use permits,[34] blasting licenses, and the like is concerned. Most such permits and licenses would necessarily authorize physical intrusions on the lands

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[34] See Note 20, *supra*, for citation to a case in which certain of the special land use permits involved here have been declared invalid on other grounds.

for which they were issued, and if plaintiffs could show their use and occupancy was disturbed thereby at a time when their use and occupancy rights were in force and effect and unextinguished, it would certainly be plain that defendants had violated their duty to protect plaintiffs from third party intrusions. Issuance of such permits or licenses would also be a clear violation of Department of Interior regulations designed to protect Native rights in lands actually occupied by them. See, e.g., 43 C.F.R. §§ 2091.5 and 2091.6-3 (1972). Plaintiffs have not, in their Amended Complaint, charged defendants with any denial of due process in the actual issuance of such permits or licenses. However, they do charge that all trespasses which allegedly occurred on lands possessed by them, whether occurring under the color of permits and licenses or not, were a foreseeable consequence of unlawful tentative approvals of State selections, and they allege that those approvals were given without according them due process. Specifically they charge that they did not receive that degree of notice and opportunity to be heard which is guaranteed by the Fifth Amendment and by the Administrative Procedure Act, 5 U.S.C. §§ 551-559. Insofar as this alleged denial of due process is claimed to have led to trespasses on lands in which they had use and occupancy rights, plaintiffs do have a cause of action; for as the next Section will show, this cause of action was not extinguished by the Settlement Act.

VIII. *Effect of the Settlement Act.*

As described in Section III above, defendants' position is that the Settlement Act bars litigation of all the claims set forth in plaintiffs' Amended Complaint. As defendants construe the complaint, all of the claims rest ultimately on aboriginal title, and aboriginal title was extinguished by the Act. Thus the basis for the claims was

destroyed. In making this argument, defendants point to both the sweeping language of Section 4 of the Act [35] and the Act's legislative history, which indicates an intention to settle conclusively all conflict over land rights between Alaskan Natives and the State of Alaska. At this point, a brief review of the mechanism set up by the Settlement Act is in order.

It is, of course, clear that the Act extinguished all aboriginal title, granting the Natives in return fee simple title to 40 million acres of land, and the payment of approximately $950 million over a period of years, part of the funds to come from mineral resources representing a two percent royalty on leasable minerals in public lands and certain lands previously selected by the State. Of the 40 million acres, 22 million are to be conveyed to Native Villages, 16 million to regional corporations set up under the Act, and 2 million to be set aside for Natives not living in villages and for certain other specified purposes. Although generally the lands to be withdrawn by the Secretary of Interior for village and regional corporation selections are to consist of lands lying within a 25-township area around each village, federal reserves and previous selections by Alaska make this impossible in certain cases. When, for these reasons, the available lands in the 25-township area are insufficient to provide for regional selection entitlements, lands three times the size of the deficiency are to be withdrawn "in lieu of lands in the nearby areas," and selections are to be made from this "in lieu" withdrawal.[36]

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[35] See text of Section 4, *supra*, pp. 14-15.

[36] Tentatively approved State selections in a three-township area around each village will not, however, bar Native selections therein. Thus each village can secure title to land in its immediate vicinity regardless of prior State selections. *See* Sections 11(a)(2) and 12(a)(1) of the Act, 85 Stat. 688, at 696, 701.

The Arctic Slope is one of the twelve regions for which a regional corporation is set up under the Act, and under the Act as the defendants read it, a large proportion of Native selections in this region will be "in lieu" selections. This results from the previous selections made by the State in this area, and the existence there of Naval Petroleum Reserve No. 4 (in which five of the eight Arctic Slope villages are located) and the Arctic National Wildlife Refuge.[37] Plaintiffs strongly object to being relegated to making the bulk of their selections, as they see it, from "interior land far from their villages with no surface value and no known mineral value." [38] Their challenge to the validity of the Secretary's tentative approvals of certain State land selections prior to passage of the Settlement Act is thus intended to result in making all those Arctic Slope lands tentatively approved for State selection available to them for selection under the Settlement Act.

This attempt by plaintiffs to challenge title to lands selected by Alaska and tentatively approved under Section 6(g) of the Statehood Act must be rejected despite this Court's finding that the approvals were void when granted. Section 4(a) of the Settlement Act expressly validates those approvals by retroactively removing the only impediment to selection of the lands, i.e., by stating that those approvals (as well as other prior conveyances) "shall be regarded as an extinguishment of the aborigi-

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[37] The Natives are, of course, still free to live in these areas, and they can gain title to the surface estate; they are, however, barred by Section 14(f) from acquiring the subsurface estate therein. 85 Stat. 688, at 704. (Where there is no such statutory bar to acquisition of the subsurface estate, that estate can be patented to the appropriate regional corporation.)

[38] Plaintiffs' Opposition to Defendants' Motion for Summary Judgment, at p. 24.

nal title thereto, if any." Section 14(g) makes it clear that leases issued under Section 6(g) of the Statehood Act are also converted to "valid existing rights" which cannot be defeated by Native selections under the Settlement Act.[39]

There is good authority for the proposition that Congress can, for its own purposes, retroactively validate actions of federal officers which were void when originally taken. In *Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476 (1937), the Supreme Court held that tortious action taken by the Commissioner of Indian Affairs in 1878, which divested the Shoshones of half of their reservation lands by settling an Arapahoe band in those lands, could be later "ratified" by Act of Congress. In *Shoshone Tribe* compensation was required because reservation lands with a congressionally recognized

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[39] Section 14(g), 85 Stat. 688, at 704, provides in pertinent part:

All conveyances made pursuant to this Act shall be subject to valid existing rights. Where, prior to patent of any land or minerals under this Act, a lease, contract, permit, right-of-way, or easement (including a lease issued under section 6(g) of the Alaska Statehood Act) has been issued for the surface or minerals covered under such patent, the patent shall contain provisions making it subject to the lease, contract, permit, right-of-way, or easement, and the right of the leasee, contractee, permittee, or grantee to the complete enjoyment of all rights, privileges, and benefits thereby granted to him. Upon issuance of the patent, the patentee shall succeed and become entitled to any and all interests of the State or the United States as lessor, contractor, permitter, or grantor, in any such leases, contracts, permits, rights-of-way, or easements covering the estate patented, and a lease issued under section 6(g) of the Alaska Statehood Act shall be treated for all purposes as though the patent had been issued to the State.

compensable interest were involved.[40] However, in the instant case, the plaintiffs never had such a compensable interest in their lands, so action by Congress to effect a transfer of the lands could not be a Fifth Amendment taking regardless of whether such action is prospective or retroactive.[41] In granting the Natives benefits in the form of money, land, and oil royalties Congress was simply responding, whether generously or otherwise to the strong moral claims of the Natives to compensation.

The same principle applies to the oil leases by the State to various companies, the validity of which depends on the validity of the approvals issued to the State. As demonstrated in Section II above, the *ownership* of natural resources is vested in the United States, and property of this kind belonging to the United States is

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[40] In a later case involving Indian rights to compensation, the Court cited *Shoshone Tribe* as standing for the proposition that "where lands have been reserved for the use and occupation of an Indian Tribe by the terms of a treaty or statute, the tribe must be compensated if the lands are subsequently taken from them." *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 326 (1942).

[41] Plaintiffs cannot avoid this result by their allegations of due process violations at the time the selections were tentatively approved since, without Congressional recognition, they had acquired no ownership interests, as against the sovereign, in the land. *Tee-Hit-Ton Indians, supra; Northwestern Bands of Shoshone Indians* v. *United States*, 324 U.S. 334, 340 (1945); *Sioux Tribe of Indians* v. *United States*, 316 U.S. 317, 326 (1942). Due process guarantees are intended to safeguard interests "a person *has already acquired* in specific benefits." *Board of Regents* v. *Roth*, 92 S. Ct. 2701, —— U.S. —— (1972) (emphasis added). Plaintiffs' allegations of due process denials as to physical intrusions which disturbed their use and occupancy of the land are, of course, another matter. *See* discussion below, pp. 37-39.

entirely subject to disposition by Congress.[42] Congress has decided to dispose of this property by ratifying a prior transfer of oil and gas reserves to the State for leasing to third parties. No compensable interest of plaintiffs, as against the sovereign, in the oil and gas had ever been recognized by Congress and none could arise simply from the ratification of prior tentative approvals.

In short, Congress could constitutionally, and did in effect, give the State good title to land tentatively approved before the Settlement Act for patent to the State. It did this by removing the only impediment to the validity of the approvals rather than by making a new conveyance of title. In doing this, Congress fully intended that there should be no further "cloud" on land titles in Alaska stemming from aboriginal land claims,[43] and that legal challenges to title based on such claims should be barred. For these reasons, and because no genuine issues of material fact exist in this matter, judgment should be entered in favor of defendants on all of plaintiffs' claims which, if successful, would result in the cancellation of patents or tentative approvals of State selections made under Section 6 of the Statehood Act or in the cancellation of leases and sales executed by the State pursuant to Section 6(g) of the Act. Because the Settlement Act extinguishes all aboriginal title in Alaskan lands, summary judgment in favor of defendants is appropriate also on those claims which, if successful, would

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[42] *United States* v. *Gratiot*, 39 U.S. (14 Pet.) 526 (1840). The authors of the Senate Report accompanying S. 35, the Senate version of the proposed claims settlement legislation, commented: "[T]he Native people have no usable property rights in the commercial resources of the lands they have historically used and occupied." S. Rep. 92-405, 92d Cong., 1st Sess. 72 (1971).

[43] S. Rep. 92-405, *supra*, at 86.

result in an order enjoining the future issuance by the Secretary of Interior of patents, leases, permits, or licenses on Arctic Slope lands.

Plaintiffs' claims, however, for relief to compensate for alleged pre-Settlement Act trespasses stand on a different footing. As explained earlier, until their possessory rights based on use and occupancy were extinguished by Congress, plaintiffs had a right to be protected by the sovereign against third-party intrusions. *Tee-Hit-Ton Indians*, 348 U.S. at 279. If plaintiffs were in fact disturbed in their use and occupancy by trespassers, i.e., by any parties coming onto the land except for those entering under Congressional authorization, then there accrued a cause of action in tort against the trespassers and a cause of action for trespass and for breach of fiduciary duty against federal officers authorizing such trespasses.

It is not at all clear that the Settlement Act bars litigation of plaintiffs' claims relating to the alleged trespasses even though they are linked to claims of aboriginal title. Section 4(c) might at first blush appear to bar such litigation since it states that "All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska . . . are hereby extinguished." However, Senate Report No. 92-405, explaining similar language [44] in S. 35 states that

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[44] "SEC. 4. (a) The provisions of this Act shall constitute a full and final settlement and extinguishment of any and all claims against the United States, the State and all other persons which are based upon aboriginal right, title, use, or occupancy of land in Alaska (including submerged land underneath all water areas, both inland and offshore, and including any aboriginal hunting or fishing rights that may exist) by any Native Village, or Native group or claims arising under the Act of May 17, 1884 (23 Stat. 24), or the Act of June

"all claims which are based upon grounds other than the *loss of* original Indian title land" remain in effect (emphasis added). Included in these unextinguished claims, the Report explains, are "suits for an accounting for funds belonging to Natives or Native groups in the custody of the United States, *for tort* or breach of contract, and for violations of the fair and honorable dealings clause of the Indian Claims Commission Act" (emphasis added).[45]

In any event, a construction of Section 4 to bar claims relating to pre-Settlement Act trespasses would appear to create constitutional infirmities in the Act which are better avoided if a constitutionally sound construction does not violate clearly expressed legislative intent. *United States* v. *Vuitch*, 402 U.S. 62, 70 (1971). For the Supreme Court did not hold in *Tee-Hit-Ton* that claims to compensation for third-party trespasses, occurring as a result of the breach of a federal duty of protection owed the Natives, could be extinguished by the sovereign without satisfying Fifth Amendment requirements. Such claims would be grounded not on ownership of land, but on rights to be protected by the federal government against unauthorized intrusions and rights to due process. Plaintiffs are entirely correct in their contention that insofar as these claims represent *accrued* causes of

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6, 1900 (31 Stat. 321), or any other statute or treaty of the United States relating to Native use or occupancy of land, including all claims based upon aboriginal right, title, use or occupancy pending before any court or the Indian Claims Commission on the effective date of this Act. All prior conveyances of public land and water areas in Alaska, or any interests therein, pursuant to Federal law, including tentative approvals pursuant to section 6(g) of the Alaska Statehood Act, shall be regarded as an extinguishment of any and all Native claims thereto." S. Rep. No. 92-405, *supra*, at 3.

[45] *Id.*, at 110-11.

action for trespass and breach of fiduciary duty, they are vested property rights protected by the Fifth Amendment. *Coombes* v. *Getz*, 285 U.S. 434, 448 (1932); *Ettor* v. *City of Tacoma*, 228 U.S. 148 (1913); *Keller* v. *Dravo Corporation*, 441 F.2d 1239, 1242 (5th Cir. 1971). Plaintiffs may be able to prove that their graveyards were desecrated and their hunting grounds torn up by bulldozers during a period when the federal government was bound to protect them from intrusions on lands used and occupied by them; and they may prove further that this occurred without reasonable notice and opportunity to be heard. This Court will not hold that a later Act of Congress could wipe out all claims against any person for these injuries simply because Congress has decided to extinguish aboriginal title.

IX. *Other Defenses.*

Defendants' contention that this action is barred by reason of plaintiffs' failure to exhaust administrative remedies under the Settlement Act can be quickly disposed of. The claims which this Court has found to have survived the Act—the claims regarding pre-Settlement Act trespasses—are not remediable under the Settlement Act, so there are no appropriate remedies to exhaust.

Defendants' contention that the action is barred by *laches* is equally insubstantial. Defendants concede that numerous protests were filed by plaintiffs and other Alaskan Natives since they argue that the Settlement Act was intended to put an end to the conflict created by the protests.[46] Defendants and others concerned chose to ignore these protests, and they cannot reasonably claim that this decision was reached in reliance on any

[46] See Note 10, *supra*, for reference to exhibits filed with plaintiffs' Amended Complaint; their genuineness is not disputed by defendants.

action or inaction by plaintiffs. Plaintiffs might well have waited to file suit until after passage of the Settlement Act because they thought Congress might provide complete remedies in the Act for the wrongs they believed they had suffered.

As to defendants' argument that the action must be dismissed for failure to join indispensable parties, that argument concerns only the effect of a decree which would impair present interests of the State of Alaska and various oil companies in the lands which plaintiffs claimed were theirs on the basis of aboriginal title. In view of this Court's ruling that defendants are entitled to summary judgment on all claims which challenge present interests in the lands concerned, this defense of nonjoinder of indispensable parties must fail.

Defendants' argument that this action is barred because it is an unconsented suit against the sovereign must also be rejected. The two exceptions to the sovereign immunity doctrine delineated in *Larson* v. *Domestic & Foreign Corporation*, 337 U.S. 682 (1949), are cases in which a federal officer is alleged to have acted in excess of his statutory powers and cases in which an officer is alleged to have acted in violation of the Constitution. 337 U.S. at 689-90. See also *Dugan* v. *Rank*, 372 U.S. 609, 621-22 (1963);[47] and *Ickes* v. *Fox*, 300 U.S. 82 (1937). In the instant case, plaintiffs have alleged that defendants were without statutory authority under the Statehood Act to permit even the tentative transfer of the lands plaintiffs claim to have held by use and occupancy, and that defendants violated plaintiffs' Fifth

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[47] It should be noted that, in *Dugan*, the Supreme Court held that the federal officers there named as defendants had been acting within the scope of authority given by Congress and that the seizures of water which gave rise to the action were takings by the government rather than trespasses.

Amendment rights by taking actions affecting plaintiffs' rights without giving plaintiffs reasonable notice and an opportunity to be heard on the matter. Even given this Court's holding that the Settlement Act retroactively validated the tentative approvals of land for State selection, the matter of the pre-Settlement Act trespasses remains; for as this Court has also held, Congress could not retroactively give defendants the authority to forsake their fiduciary duty to Native Americans by permitting third parties to interfere with plaintiffs' use and occupancy before aboriginal title was extinguished. Hence, plaintiffs' claims relating to pre-Settlement Act trespasses appear to fall within the exceptions set forth in *Larson*.

Moreover, plaintiffs base their due process claims in part on the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*, and the Court of Appeals for this Circuit has held that Congress has waived sovereign immunity as to cases to which this Act applies. *Scanwell Laboratories, Inc.* v. *Shaffer*, 137 U.S.App.D.C. 371, 424 F.2d 859, 873 (1970). Of course, no such waiver could be found if Congress had elsewhere expressed its intent to prevent judicial review. However, this Court has found that, although the Settlement Act foreclosed review of certain of plaintiffs' claims, it did not foreclose review of federal officers' actions relating to pre-Settlement Act trespasses.

There might conceivably be some cases in which "the immunity doctrine is so transcending as to require dismissal of the suit" despite claims based on the Administrative Procedure Act, *State of Washington* v. *Udall*, 417 F.2d 1310, 1320 (9th Cir. 1969), but this does not appear to be such a case. Whether this suit should result in a recovery of damages from the individual defend-

ants [48] or in some form of equitable relief, e.g., an order requiring defendants to take action on plaintiffs' behalf to recover damages from any parties shown to have trespassed on plaintiffs' lands before extinction of their aboriginal title, it does not appear that the judgment would "interfere with the public administration" or "expend itself on the public treasury." *Dugan* v. *Rank*, 372 U.S. at 621, citing *Land* v. *Dollar*, 330 U.S. 731, 738 (1947). In ruling thus on the sovereign immunity defense, this Court is not intimating its views on the proper form of relief should plaintiffs prove their claims; it holds only that the doctrine of sovereign immunity is not a bar to the claims in this suit relating to pre-Settlement Act trespasses.

Finally, the Court finds no merit in the contention that Section 2(f) of the Settlement Act indicates that the Court lacks subject matter jurisdiction. That section provides that no provision of the Act shall be construed to grant jurisdiction for suits against the United States and its officers "with respect to the claims extinguished by the operation of this Act." The plaintiffs have not alleged jurisdiction on the basis of that Act. Among the jurisdictional grounds they do allege are 28 U.S.C. §§ 1331, 1332, and 1362. Nothing in Section 2(f) of the Settlement Act would clearly destroy these independent sources of jurisdiction, and the presumption is always in favor of judicial review. *Barlow* v. *Collins*, 397 U.S. 159, 167 (1970); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967).

The Court cannot pretend that justice in a Platonic sense can be rendered in this case. Perhaps in an ideal

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[48] *Bivens* v. *Six Unknown FBI Agents*, 403 U.S. 388 (1971), may be applicable to the alleged Fifth Amendment violations. But see Mr. Justice Harlan's concurring opinion at 409, note 9.

system of moral accounting, plaintiffs would be entitled to all of the lands they have claimed regardless of the interests claimed by the State of Alaska and others in those lands. This Court is, however, not free to allow plaintiffs to proceed on such a theory when decisions of the Supreme Court and Acts of Congress foreclose it. The Court can, and it has here attempted to, set forth the framework within which plaintiffs can seek to establish the factual bases for the relief to which they are entitled under the Constitution and laws of the United States if their claims are proven.

In accordance with the foregoing opinion, it is by the Court this 19th day of April, 1973,

ORDERED that defendants' motion for summary judgment be, and it hereby is, granted in part and denied in part; and it is further

ORDERED that defendants' motion for summary judgment be, and it hereby is, granted as to all counts of the Amended Complaint except those seeking relief for trespasses allegedly occurring on plaintiffs' lands before the effective date of the Alaska Native Claims Settlement Act of 1971, 85 Stat. 688; and it is further

ORDERED that defendants' motion for summary judgment be, and it hereby is, denied as to all counts concerning the said allegations of trespass.

/s/ Oliver Gasch
Judge

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 77-3234, 77-3972

DC # CV 75-215 JMF

UNITED STATES OF AMERICA,
Plaintiff,

and

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Plaintiff-Intervenor-Appellant,
ATLANTIC RICHFIELD COMPANY, *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Alaska (Anchorage)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Alaska (Anchorage) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgments of the said District Court in this Cause be, and hereby affirmed.

Costs in this court in favor of the appellees and against the appellant.

Costs:	
BRIEF FOR THE APPELLEES	$9,377.00
TOTAL	$9,377.00

Filed and entered January 4, 1980

Supreme Court, U. S.
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JUL 2 1980
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Nos. 79-1739 and 79-1743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the court below err in holding that section 4(a) of the Alaska Native Claims Settlement Act confirmed that prior conveyances of land pursuant to federal tentative approvals of State land selections under the Alaska Statehood Act extinguished the aboriginal title (if any) to such lands as of the dates of the prior conveyances or tentative approvals?

2. Did the court below err in holding that section 4(c) of the Settlement Act extinguished all trespass claims of Alaska Natives based on claims of aboriginal right, title, use, or occupancy of land in Alaska?

3. Did the court below err in holding that it was unnecessary to decide the constitutional issues raised by petitioner Inupiat Community?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	6
A. The Court Below Correctly Decided Straightforward Questions of Statutory Construction, and Its Avoidance of Constitutional Questions Was Plainly Correct in Light of the Teachings of This Court	6
1. Interpretation of Section 4 of the Settlement Act	6
2. The Constitutionality of the Settlement Act	15
B. The Decision of the Court Below Is Not Inconsistent with Any Decision of the Court of Appeals for Any Other Circuit	22
CONCLUSION	23
APPENDIX A	
List of Parties	1a

TABLE OF AUTHORITIES

CASES:

Ashwander v. TVA, 297 U.S. 288 (1936)	21
Coombes v. Getz, 285 U.S. 434 (1932)	16
Dick v. New York Life Ins. Co., 359 U.S. 437 (1959)	21
Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978)	17
Edwardsen v. Morton, 369 F. Supp. 1339 (D.D.C. 1973)	22, 23
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976)	6
Etter v. City of Tacoma, 228 U.S. 148 (1913)	16
Greyhound Corp. v. Mt. Hood Stages, Inc., 437 U.S. 322 (1978)	6

Table of Authorities Continued

Page

Hurley v. Kincaid, 285 U.S. 95 (1932) 17

Inupiat Community of the Arctic Slope v. United States, No. 77-596 (Ct. Cl., filed Dec. 16, 1977) ...6, 19

Menominee Tribe v. United States, 391 U.S. 404 (1968) 12, 13

Miller v. United States, 159 F.2d 997 (9th Cir. 1947).. 4

Organized Village of Kake v. Egan, 369 U.S. 60 (1962) 2, 4

Regional Rail Reorganization Act Cases, 419 U.S. 102 (1974) 5, 16, 17, 18, 20, 23

Seese v. Bethlehem Steel Co., 168 F.2d 58 (4th Cir. 1948) 16

Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937) 4, 8, 13, 16

Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955) 7, 13, 15, 16

United States v. Causby, 328 U.S. 256 (1946) 17

United States v. Gemmill, 535 F.2d 1145 (9th Cir.), *cert. denied sub nom.* Wilson v. United States, 429 U.S. 982 (1976) 4

United States v. Heinszen & Co., 206 U.S. 370 (1907) .. 16

United States v. Munsingwear, Inc., 340 U.S. 36 (1950) 22

United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974) 8, 16

United States v. Santa Fe Pacific R.R., 314 U.S. 339 (1941) 7

Yearsley v. Ross Construction Co., 309 U.S. 18 (1940) 17

CONSTITUTIONAL PROVISION:

U.S. Const., Fifth Amendment 7, 13, 15, 17, 19, 21, 23

TREATY:

Treaty of Cession, 15 Stat. 539 (1867) 4

Table of Authorities Continued

Page

STATUTES:

Alaska Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.* ..... *passim*

Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339 ..... i, 2, 4, 7

Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-62 16

Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-794 16

Tucker Act, 28 U.S.C. § 1491 18

28 U.S.C. § 1505 19

28 U.S.C. § 2501 20

LEGISLATIVE MATERIALS:

S. Rep. No. 91-925, 91st Cong., 2d Sess. (1970) 10

S. Rep. No. 92-405, 92d Cong., 1st Sess. (1971) 9, 10, 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1739

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
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No. 79-1743

UNITED STATES OF AMERICA,
Petitioner,

v.

ATLANTIC RICHFIELD CO., ET AL.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION *

STATEMENT OF THE CASE

Petitioners seek damages for alleged trespasses to lands that were subject to claims of aboriginal title by Alaska Natives prior to the enactment of the Alaska

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* This brief is being filed in the interests of all respondents. A list of the parties is attached as Appendix A.

Native Claims Settlement Act, 43 U.S.C. §§ 1601 *et seq.*, on December 18, 1971. This action was commenced on October 7, 1975, by the United States, suing "in its own right and on behalf of the Eskimos inhabiting the Arctic Slope,"[1] against the State of Alaska and, as amended, 142 individual and corporate defendants. The Arctic Slope Native Association and the Inupiat Community of the Arctic Slope filed a joint motion to intervene on December 23, 1975. That motion was subsequently granted with respect to the Inupiat Community.

Native claims were a source of uncertainty in Alaska for more than a century (United States Petition at 25a-30a). Section 6 of the Alaska Statehood Act of 1958, Pub. L. No. 85-508, 72 Stat. 339, 340, authorized the State to select 103,350,000 acres of public lands, provided for "tentative approvals"[2] of such selections by the Secretary of the Interior, and authorized the State to execute conditional leases of selected lands following tentative approval (*id.* at 30a-31a). While the Statehood Act contained a disclaimer of State title to any lands "held" by Natives (*id.* at 31a), no lands on the Arctic Slope had ever been recognized by the United States as being held by any Native group. In *Organized Village of Kake* v. *Egan,* 369 U.S. 60, 65-66 (1962), this Court declared:

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[1] The Arctic Slope comprises the northern 56,500,000 acres of Alaska. Its population in 1970 was 3,451 persons, over 90 percent of whom lived in five compact cities or villages, with over 60 percent in the City of Barrow alone. The alleged trespasses occurred primarily in the area of Prudhoe Bay, more than two hundred miles from Barrow.

[2] "Tentative" approvals were final in all respects but for the formality of a patent dependent on a survey.

> "It was understood that the disclaimer provision left the State free to choose Indian 'property' if it desired, but that such a taking would leave unimpaired the Indians' right to sue the United States for any compensation that might later be established to be due."

In these circumstances, "[i]n 1964 and 1965 the State selected, and the Secretary of the Interior tentatively approved, approximately 1,650,000 acres of land on the Arctic Slope, a region in which the existence of large oil deposits was suspected." United States Petition at 32a. In 1964, 1965, 1967, and 1969, the State issued oil and gas leases for some of these tentatively approved Arctic Slope lands. Meanwhile the Secretary of the Interior had authorized various other entries onto Arctic Slope lands under the mining laws. *Id.* at 33a. The overwhelming bulk of the "trespasses" asserted in the present action were made pursuant to, and in reliance on, federal and State authorizations. Natives of the Arctic Slope made claims to rights in the lands in question (though no recognition or adjudication of those claims had—or has to this day—ever occurred) and asserted that the entries were therefore trespassory. Controversy over such Native claims asserted statewide led to the enactment in 1971 of the Alaska Native Claims Settlement Act, by which Congress intended through the legislative process to resolve all disputes concerning Native claims based on alleged aboriginal title in Alaska, and believed that it had done so.

Petitioners allege that Alaska Natives enjoyed the exclusive use and occupancy of land in Alaska from time immemorial, and that therefore those Natives held unrecognized aboriginal title to such lands until all such titles were extinguished by the Settlement Act.

Petitioners contend that pre-Settlement Act entries on Native-claimed lands were trespasses; specifically, they claim that the federal and state actions approving such entries are invalid because of the existence of claims of aboriginal title. Petitioners further assert that claims based on those alleged trespasses were not extinguished by the Settlement Act. The Settlement Act was intended to effect an orderly political resolution of decades of controversy over Native claims in Alaska. The Act admittedly did extinguish all aboriginal titles for the future. It provided for the grant to Alaska Natives of $962,500,000 in cash and more than 40,000,000 acres of land. In spite of all this, petitioners nonetheless claim that the Act was intended (or was constitutionally required) to preserve claims for alleged pre-Settlement Act trespasses, many of which had been federally authorized. The resolution of these claims would require years of litigation in the courts.[3]

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[3] Among the issues that would have to be addressed in such litigation are (1) whether the Inupiat Community has and has had the degree of coherence and organization required to make it an entity capable of exercising aboriginal title; (2) as to each and every portion of the Arctic Slope where trespasses are alleged, whether any Native use and occupancy met the tests for aboriginal title as established by judicial decisions; (3) whether any aboriginal title had been extinguished by the Treaty of Cession of 1867, *see* Miller v. United States, 159 F.2d 997 (9th Cir. 1947), or by any or all of a host of federal statutes, policies and actions dealing with Alaska lands from 1867 to 1958, *see* Shoshone Tribe of Indians v. United States, 299 U.S. 476 (1937); United States v. Gemmill, 535 F.2d 1145 (9th Cir.), *cert. denied sub nom.* Wilson v. United States, 429 U.S. 982 (1976), up to and including the Alaska Statehood Act and federal actions thereunder, *see* Organized Village of Kake v. Egan, 369 U.S. 60, 65-66 (1962); (4) the location of and responsibility for each entry by one or more of the 143 respondents onto any portion of the Arctic Slope between 1867 and 1971; (5) the nature and amount of damages from each such entry; and (6) various questions of contribution and indemnification among the 142 private respondents, the State of Alaska, and the United States.

Respondents moved to dismiss all trespass claims of petitioners based upon any alleged aboriginal title. The district court issued its opinion on June 3, 1977, and by its order dated July 5, 1977, dismissed the complaints. The district court's decision was unanimously affirmed by the court below on January 4 of this year. Rehearing was denied on February 22.

Both lower courts agreed that, assuming without deciding that Alaska Natives held aboriginal title to any portion of the Arctic Slope at the time the entries complained of were made, those entries made on lands that had been conveyed pursuant to federal law or selected by the State of Alaska with federal "tentative approval" were not trespasses because section 4(a) of the Settlement Act had confirmed these prior conveyances and tentative approvals, thereby extinguishing any aboriginal titles as of the dates of the conveyances or tentative approvals. In addition, both courts agreed that *all* claims of trespass that were based on claims of aboriginal title to Alaska lands had been explicitly extinguished by section 4(c) of the Settlement Act.

Finally, the court of appeals found it unnecessary to pass on the Inupiat Community's argument (not raised by the United States) that the Settlement Act, as construed by both courts, is unconstitutional as taking alleged property rights (trespass claims) without just compensation. The district court had rejected the Inupiats' constitutional argument on the merits; the court of appeals held, following the doctrine of *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974), that, even assuming that the Inupiats were entitled to compensation, the Settlement Act did not impair their right to obtain it in a Court of Claims action.

A lawsuit seeking compensation for any such taking is, in fact, now pending in the Court of Claims. *Inupiat Community of the Arctic Slope* v. *United States,* No. 77-596 (Ct. Cl., filed Dec. 16, 1977). In its Court of Claims action the Inupiat Community is seeking damages from the United States for, *inter alia,* breach of its trust responsibilities by authorizing the alleged trespasses and, in the alternative, just compensation for the alleged taking of the Inupiats' trespass claims.

REASONS FOR DENYING THE WRIT

A. The Court Below Correctly Decided Straightforward Questions of Statutory Construction, and Its Avoidance of Constitutional Questions Was Plainly Correct in Light of the Teachings of This Court.

1. *Interpretation of Section 4 of the Settlement Act*

The constructions given to section 4(a) and 4(c) of the Settlement Act by the courts below are consistent with, and compelled by, the language and legislative history of those sections. Accordingly, the questions of statutory construction presented by this case have no special claim to this Court's attention.

a. The starting point in this case, as in every case involving statutory construction, is the language of the statute itself. *See, e.g., Greyhound Corp.* v. *Mt. Hood Stages, Inc.,* 437 U.S. 322, 330 (1978); *Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976). The language of sections 4(a) and 4(c) could scarcely be clearer:

> "(a) All prior conveyances of public land and water areas in Alaska, or any interest therein, pursuant to Federal law, and all tentative approvals pursuant to section 6(g) of the Alaska

> Statehood Act, shall be regarded as an extinguishment of the aboriginal title thereto, if any.
>
> * * *
>
> "(c) All claims against the United States, the State, and all other persons that are based on claims of aboriginal right, title, use, or occupancy of land or water areas in Alaska, or that are based on any statute or treaty of the United States relating to Native use and occupancy, or that are based on the laws of any other nation, including any such claims that are pending before any Federal or state court or the Indian Claims Commission, are hereby extinguished."

Section 4(b), which is not in controversy, extinguishes any aboriginal title that might have existed in Alaska on the date of the Act.[4]

Both courts below correctly held that section 4(a) extinguished aboriginal titles as of the dates of the prior conveyances and tentative approvals of state selections. United States Petition at 5a-7a, 46a-54a. The entries made pursuant to those authorizations must now be regarded as non-trespassory, because the basis of the Natives' right to object to the entries—their claimed aboriginal title—was extinguished by Congress as of dates prior to the entries. It was within Congress' power to validate the prior conveyances and

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[4] Petitioners concede that they have no Fifth Amendment claim against the United States for the taking of the unrecognized aboriginal title itself. As this Court held in Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955), "Indian occupation of land without government recognition of ownership creates no rights against taking or extinction by the United States." *Id.* at 285. Quoting with approval from the decision in United States v. Santa Fe Pacific R.R., 314 U.S. 339, 347 (1941), the Court also noted that the "power of Congress in that regard is supreme. The manner, method, and time of such extinguishment raise political, not justiciable, issues." 348 U.S. at 281.

tentatives approvals. *See, e.g., Shoshone Tribe of Indians* v. *United States,* 299 U.S. 476, 495-96 (1937); *United States* v. *Northern Paiute Nation,* 490 F.2d 954, 958 (Ct. Cl. 1974).

While section 4(a) eliminated many of petitioners' claims, section 4(c) explicitly eliminated all of them. Again, neither the district court nor the court of appeals had any difficulty in concluding that section 4(c) extinguished all aboriginal trespass claims. United States Petition at 7a-8a, 55a-65a. Such claims are "based on claims of aboriginal right"—because proof of aboriginal right or title is an essential element of the claims, as petitioners concede—and thus fall within the explicit terms of section 4(c). Moreover, as the court below explained, a different construction would leave significant portions of the section superfluous or meaningless:

> "The subsection reads, 'All claims against the United States, the State, and all other persons that are based on claims of aboriginal right . . . are hereby extinguished.' Since only the United States could extinguish the Natives' aboriginal title, only the United States could be the defendant in a suit based on extinguishment of title. Yet all claims against 'the State, and all other persons' were extinguished as well. In order to make the language regarding 'the State, and all other persons' meaningful, there is no choice but to construe the statute to extinguish certain types of claims, 'based on aboriginal right,' that might be brought against the State and other persons. The quintessential action against private citizens, based on aboriginal title, is an action for wrongful invasion, use, and assertion of dominion over the property—trespass." United States Petition at 7a-8a.

Thus, the court below correctly held that in section 4(c) Congress clearly and unequivocally stated its intention that all claims based on claims of aboriginal title, including trespass claims, be extinguished.

b. The Inupiat Community bases its argument primarily on its reading of the legislative history of the Settlement Act. The court below reviewed the legislative history in detail, noting in particular the repeated statements in that history to the effect that the Settlement Act was to be "broadly" applied so as to extinguish "all aboriginal claims," and concluded that "it would be incomprehensible to us if Congress did not intend to extinguish the trespass claims, along with all other claims based on aboriginal title, when it gave the Natives over 60,000 square miles of fee simple land and almost a billion dollars." United States Petition at 10a-11a.

The only argument requiring discussion that bears on the proper construction of section 4(a) or 4(c) is the Inupiat Community's argument that the report on the Settlement Act issued by the Senate Committee on Interior and Insular Affairs in 1971, S. Rep. No. 92-405, expressed a congressional intention that the Act not extinguish Native "tort" claims. Inupiat Community Petition at 18-20.[5] The issue was thoroughly briefed by all parties and was discussed at considerable length in the opinions of both courts below. United States Petition at 11a-14a, 58a-65a. The court of ap-

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[5] The United States, in contrast to the Inupiat Community, concedes that the legislative history of the Act is not dispositive in its favor. United States Petition at 7. Respondents submit that the history is dispositive against both petitioners.

peals adopted the reasonable interpretation of the 1971 Senate Report language referring to tort claims:

> "True, the report language preserves suits 'for tort,' and trespass is a tort. However, we think that the Senate's meaning, as indicated by the three other kinds of action it specifically preserved and by the legislative history generally, was that all kinds of civil action were preserved if they were not based in any way on aboriginal title. Thus, such 'tort' actions as those based on personal injury or damage to personal property would not be extinguished. The passage is no better than ambiguous on the issue of whether or not trespass actions based on aboriginal title were to be preserved." United States Petition at 12a.

Moreover, the 1971 report contained, in addition to the language relied on by petitioners, an unequivocal declaration that section 4(c) constitutes "a full and final extinguishment of any and all claims based upon aboriginal . . . title." Thus, taken as a whole, the Senate Report is consistent with the interpretation of the Act adopted by the courts below.

Both courts also noted that the passage on which the Inupiat Community relies is of doubtful value in light of its origins. The 1970 Senate bill and report both spoke of extinguishing *land* claims as distinguished from "claims based on grounds other than loss of original Indian title land." In 1971 the Senate committee excised from the bill the language referring to land claims and substituted the broader formula extinguishing "claims based upon aboriginal right, title, use or occupancy." However, the corresponding change was not made in the 1971 Senate report. The court below concluded that, even if the language in

the 1971 report meant what petitioners claim, the two sentences involved did not override the remainder of the legislative history, which the court had reviewed thoroughly.[6]

Finally, the court below correctly concluded that, even if the contested language in the 1971 Senate report meant what petitioners claim, it was clear that the bill which became the Settlement Act "followed the intent" of the 1971 House bill, not the Senate bill discussed in the Senate committee's report. United States Petition at 15a. The language of the 1971 Senate report does not, therefore, provide a basis for ignoring the plain language of section 4 or the legislative history directing that the Settlement Act's extinguishment provisions be broadly applied.

c. The principal argument of the United States is that the court of appeals improperly applied rules of construction established by this Court, although the United States concedes that the court did not overlook the applicable rules. United States Petition at 6-7. Petitioners also argue that the court below erred in construing the Act in a way that exposes the United States to what the petitioners claim (without any support in the record) would be a potentially large liability. However, nothing in the court of appeals' decision establishes that the United States will have any liability whatever to the Alaska Natives for the alleged taking of accrued Native trespass claims; nor is the

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[6] The Inupiats make much of the fact that the court of appeals at one point referred to the language of the 1971 Senate Report as a possible "hasty mistake." Inupiat Community Petition at 18-20. They conveniently ignore the court of appeals' thorough analysis of the legislative history as a whole, which led the court to adopt a construction of the Settlement Act that followed both the plain meaning of the statute and Congress' expressed intentions.

United States prejudiced by the decision below in any way in the Court of Claims suit now pending.[7]

The decision in *Menominee Tribe* v. *United States,* 391 U.S. 404 (1968), was not, as the United States suggests, United States Petition at 8, based on a general rule requiring an interpretation of statutes that would avoid subjecting the United States to liability for just compensation. The question in *Menominee* was whether Congress had taken hunting and fishing rights that it had explicitly granted to the Indians in a treaty. In concluding that no taking had occurred, the Court relied in a subsidiary fashion on the principle that "the intention to abrogate or modify a treaty is not to be lightly imputed to the Congress." 391 U.S. at 413. The State of Wisconsin had argued that a statute implicitly took the Indians' hunting and fishing rights, but the Court held that the statute had to be read in connection with other legislation, passed by the same Congress, which made it clear that the Indians' rights were not to be affected. Unlike the statutory language here, the language in *Menominee* was ambiguous and so required construction through extraneous means.

In the present case, moreover, the Natives had only unrecognized aboriginal title upon which to base their trespass claims. In contrast to treaty rights, which

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[7] If the present respondents were held liable to the Inupiats, they would of course claim over against the United States for having induced the trespasses by granting tentative approvals of State land selections and by other federal authorizations. Many of the defendants asserted that claim by way of counterclaims in their answers to the complaints herein. Thus reversal of the decision below would by no means absolve the United States of liability as its petition assumes.

are protected by the Fifth Amendment, Congress had plenary power to extinguish that unrecognized aboriginal title without liability for compensation. *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955). Thus the district court here was on sound ground in holding that no compensable taking occurred when the trespass claims were extinguished by the Settlement Act. (See p. 15-16 & n.8, *infra.*) Certainly there was no established doctrine to the contrary that Congress could be assumed to have taken into account. In *Menominee,* in contrast, the law was well known and beyond dispute that a taking of treaty rights would require compensation. 391 U.S. at 407 & n.4, 413 n.15; *Shoshone Tribe* v. *United States,* 299 U.S. 476, 497 (1937). It was in this context that the Court observed, after having decided the issue on the other grounds described above, that Congress was unlikely to have deliberately subjected the United States to a claim for a taking of treaty rights without making the taking explicit. *Menominee* furnishes no basis for attacking the decision below.

Finally, petitioners' assertion that the court below misapplied the principle of statutory construction that statutes are to be construed in favor of Indians is unsound. On the contrary, the court below accepted this principle as a "guideline" and applied it in a manner appropriate to the circumstances of this case:

> "[This] rule of construction . . . is based on a concern that the powerful not take advantage of the helpless and uneducated. . . . Where, as here, the Inupiats were represented before Congress by such illustrious counsel as former Supreme Court Justice Arthur Goldberg and former Attorney General Ramsey Clark, we think the rule of con-

> struction operates with less force." United States Petition at 16a.

The court also correctly held that Congress' own mandate that the extinguishment provisions are to be "broadly" construed "takes precedence over generalized rules of construction." *Id.*

The United States contends that the court below failed properly to apply three other canons of construction which the court expressly recognized: that ambiguous statutes should be construed " '(2) to avoid constitutional questions; (3) to avoid taking vested rights; and (4) non-retroactively.' " United States Petition at 7. But the court below dealt with these canons in a wholly satisfactory manner. There is no substantial constitutional question, since even if there was a taking the Court of Claims remedy makes it a compensated taking. In the unlikely event that "vested rights" are involved, the Court of Claims remedy will vindicate them. The "retroactivity" point involves only section 4(a), not the completely dispositive section 4(c); and a non-retroactive construction of section 4(a) would involve torturing the plain meaning of Congress' language and intent to an extent the court below quite correctly found impermissible.

Contrary to petitioners' assertions, this case does not present any substantial question of statutory interpretation. The language of the pertinent provisions is clear. The legislative history of the Settlement Act is consistent with the plain meaning of section 4(a) and 4(c). And all pertinent principles of statutory construction were properly applied by the court below.

2. *The Constitutionality of the Settlement Act*

The Inupiat Community asserts that the court below failed to consider a constitutional question that, if decided in its favor, would require that the district court's dismissal of its complaint be reversed. The Inupiat Community urges, in essence, that if the Settlement Act extinguished the accrued aboriginal trespass claims of Alaska Natives it did so unconstitutionally because (1) such trespass claims constitute vested property rights that, under the Fifth Amendment, the United States may not take or extinguish without payment of just compensation, and (2) the more than forty million acres of land and nearly one billion dollars that Congress gave Alaska's Natives in settlement of their aboriginal-title claims and claims based thereon did not constitute just compensation for the claims extinguished. The Inupiat Community thus contends that the Settlement Act must either be held unconstitutional or be construed as not extinguishing accrued aboriginal trespass claims.

The United States, which raised no Fifth Amendment issue below, nonetheless is unhappy that the taking question remains open and would like this Court to decide it now rather than leaving it to orderly adjudication in the Inupiats' pending Court of Claims action.

The district court held that the Inupiat Community's constitutional claim is without merit, essentially on the ground that since under *Tee-Hit-Ton Indians* v. *United States,* 348 U.S. 272 (1955), aboriginal title is not a constitutionally protected interest and may be extinguished by Congress without any requirement of compensation, trespass claims based on aboriginal title

can enjoy no higher status. While the district court's reasoning is correct,[8] the court of appeals was also correct in finding it unnecessary to reach the constitutional issue because, if the Natives' extinguished trespass claims were constitutionally protected, any additional compensation that the Natives might be due would be available in the Court of Claims.

This Court addressed the identical issue in the *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974). Those cases involved challenges by railroad creditors and others to the Regional Rail Reorganization Act of 1973, 45 U.S.C. §§ 701-794. That Act provided for the transfer, for reorganization purposes, of properties of certain northeastern railroads to a new corporation, with significant consequences for

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[8] In *Tee-Hit-Ton,* this Court held that Indian occupation of land without government recognition of ownership creates *no* rights against taking or extinction by the United States. 348 U.S. at 285. Since the greater interest—the use and occupancy of the lands—is not constitutionally protected, trespass claims to protect that interest are not constitutionally protected either. The cases on which petitioners rely to show that accrued claims are constitutionally protected are all distinguishable. Interests subject to legislative control may be extinguished without compensation, as were the claims under the Portal-to-Portal Act of 1947, 29 U.S.C. §§ 251-62. *See, e.g.,* Seese v. Bethlehem Steel Co., 168 F.2d 58, 64 (4th Cir. 1948). Coombes v. Getz, 285 U.S. 434 (1932), and Ettor v. City of Tacoma, 228 U.S. 148 (1913), relied on by the Inupiats, both involved preservation of claims that were contractual in nature, which the state could not impair without compensation.

Moreover, the federally authorized entries could constitutionally be (as they were) ratified and validated by section 4(a) so as to render them non-trespassory. Shoshone Tribe of Indians v. United States, 299 U.S. 476, 495 (1937); United States v. Heinszen & Co., 206 U.S. 370, 382 (1907); United States v. Northern Paiute Nation, 490 F.2d 954 (Ct. Cl. 1974).

creditor claims against the railroads. The creditors argued, just as the Inupiats do here, that the compensation fixed by Congress was inadequate and that therefore the legislation effected a taking of their property without payment of just compensation. This Court, however, sustained the constitutionality of the statute without reaching the question whether a constitutionally compensable "taking" had occurred:

> "The general rule is that whether or not the United States so intended, '[i]f there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine.' *United States* v. *Causby,* 328 U.S. 256, 267 (1946). '[I]f the authorized action . . . does constitute a taking of property for which there must be just compensation under the Fifth Amendment, the Government has impliedly promised to pay that compensation and has afforded a remedy for its recovery by a suit in the Court of Claims.' *Yearsley* v. *Ross Construction Co.,* 309 U.S. 18, 21 (1940). See also *Hurley* v. *Kincaid,* 285 U.S. 95 (1932). In *Yearsley,* the Court, speaking through Mr. Chief Justice Hughes, went on to hold that 'it cannot be doubted that the remedy to obtain compensation from the Government *is as comprehensive as the requirement of the Constitution* . . . .' 309 U.S., at 22." 419 U.S. at 126-27 (footnote omitted) (emphasis in original).[9]

Thus, because the creditors had an adequate remedy in the Court of Claims for any taking effected by the Act, no uncompensated taking of constitutionally pro-

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[9] The analysis and holding of the Regional Rail Reorganization Act Cases were reaffirmed and applied by this Court in Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59, 94 n.39 (1978).

tected property could occur. Arguments that statutes were unconstitutional because they might involve takings would therefore fall unless the court discerned a "clearly expressed congressional intention," *id.* at 133, to repeal the Court of Claims' Tucker Act jurisdiction. Whether Congress intended to effect a "taking," whether Congress intended that compensation be available,[10] whether Congress had provided compensation that it believed adequate—all these questions are irrelevant to the constitutionality of the statute so long as the pre-existing Tucker Act jurisdiction was not repealed. *Id.* at 126-36. Since neither petitioner alleges that the legislative history of the Settlement Act contains any evidence that Congress intended to repeal Tucker Act jurisdiction over the taking issue, and since in fact there is no such evidence, the *Rail Cases* decision is dispositive here.

The Inupiat Community is asking this Court to decide the taking question before it has been properly presented to any court. Its petition is premised on the assertion that if its trespass claims have been extinguished then a taking has occurred for which compensation is due; yet the taking issue cannot finally be resolved in a private trespass action. In fact, the

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[10] While Congress' intention as to the availability of compensation through the Court of Claims route is irrelevant under the Regional Rail Reorganization Act Cases, petitioners are disingenuous in professing shock that there is even a possibility that the federal treasury rather than the State of Alaska and the private defendants herein might end up paying for the alleged trespasses. The federal role in authorizing and inducing the entries in question, see United States Petition at 30a-33a, makes such a result appropriate. That result would probably have obtained in this action, even had petitioners prevailed, through a judgment in defendants' favor on their counterclaims against the United States. See p. 12 n.7, *supra*.

Inupiat Community has already proceeded in the correct forum for its taking claims, by bringing its suit for just compensation in the Court of Claims. *Inupiat Community of the Arctic Slope* v. *United States,* No. 77-596 (Ct. Cl., filed Dec. 16, 1977).[11] Since the Settlement Act contains no hint of a "clearly expressed congressional intention" to repeal the Court of Claims' Indian Tucker Act jurisdiction, that court's authority to hear the case is clear. *See* 28 U.S.C. § 1505.

The United States (Petition at 9) suggests that its position in the Court of Claims action will be prejudiced if the decision below is permitted to stand. However, the court of appeals was careful not to pass judgment on any aspect of the taking question:

> "The constitutional question we are asked to obviate is whether or not under the Fifth Amendment compensation must be paid for taking the Inupiats' trespass claims. Our holding here clears the way for this question to be addressed in some other forum, but we express no opinion on what the answer should be." United States Petition at 16a-17a.

The Court of Claims is not, as the United States contends, limited to a choice between awarding relief against the United States and leaving the claimants "wholly without remedy." Given the essentially political nature of unrecognized aboriginal claims, Congress appropriately provided a legislative rather than a judicial remedy, and it granted generous compensa-

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[11] To prevail in the Court of Claims, the Inupiats will be required: (a) somehow to overcome the powerful arguments that no compensable taking was involved, see p. 12 n.8, *supra,* and (b) to prevail on each of issues (1) through (3) listed at p. 4 n.3, *supra.* Any recovery, let alone a substantial recovery, by the Inupiats is highly improbable.

tion for the package of interests it extinguished in the Settlement Act, giving the Natives more than 40,000,000 acres of land and nearly a billion dollars. The Court of Claims might well decide, even in the unlikely event that it found a taking, that no further compensation is due to be awarded.[12]

In any event, it is premature for this Court to consider such questions at this time. If the Inupiat Community pursues its Court of Claims action, and if that Court should reach the taking claim [13] and should render a decision adverse to the United States on that claim, this Court will have an opportunity to consider all aspects of the taking question in its proper setting.[14]

If the United States has "one hand tied," United States Petition at 9, in that it will be precluded from arguing in the Court of Claims that the Inupiats'

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[12] The court of appeals' comment that the Inupiat Community might recover from the United States the damages that it is seeking against the private respondents in this case was sheer speculation. Furthermore, the amount of damages (if any) to which the petitioners would be entitled in this case is the subject of sharp controversy.

[13] The taking issue is entirely "hypothetical or speculative," *Rail Cases*, 419 U.S. at 143, until the breach-of-trust issues are decided by the Court of Claims. A decision on those issues may moot the taking issue.

[14] The Inupiat Community contends that other suits will be brought by Alaska Natives in the Court of Claims for just compensation if the decision below is not reviewed. Inupiat Community Petition at 23. However, any other such claims would be barred by the applicable statute of limitations, 28 U.S.C. § 2501, since they accrued on the enactment of the Settlement Act of 1971, more than six years ago. The Inupiats themselves admit (Petition at 10) that they brought their action in 1977 because they "were forced by statute of limitations considerations" to do so.

proper remedy is against the present defendants, the United States has no one but itself to blame. It was the United States, not these defendants, that initiated the trespass litigation and pressed it to conclusion while acquiescing in a stay of the Court of Claims proceeding. Moreover, in the court below the United States expressly disavowed both aspects of the Inupiats' constitutional claim—that it should be decided in this case, and that the Settlement Act is unconstitutional:

> "[The Inupiats claim] that the destruction by Congress of accrued common-law trespass claims amounts to the destruction of a compensable property right protected by the Fifth Amendment, and that to read the Settlement Act as wiping out the claims in this case implicates the Act's constitutionality. *The United States does not go this far. Nor do we say that the district court's decision works an unconstitutional result.* What we do say is that it is out of keeping with those canons of judicial interpretation which disfavor retroactive operation of the law, and which favor the resolution of statutory ambiguities to the advantage of Native Americans." Brief of the United States in the Ninth Circuit, p. 74 (emphasis added).

The fact that the United States is now unhappy with its strategy throughout this case is no justification for its request that this Court violate the fundamental, well-established rule that questions will not be decided when deciding them is wholly unnecessary for the resolution of the litigation before it. *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 445 (1959); *see also Ashwander* v. *TVA*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring). The United States has not shown, and cannot show, any reason why a decision on whether

the Inupiats are entitled to recover in their Court of Claims action is necessary—or even relevant—to a decision of petitioners' present lawsuit against the State of Alaska and 142 private defendants. In fact it is plain that such a decision is altogether unnecessary.

B. The Decision of the Court Below Is Not Inconsistent with Any Decision of the Court of Appeals for Any Other Circuit.

Both the United States and the Inupiat Community make much of the decision of the United States District Court for the District of Columbia in *Edwardsen* v. *Morton,* 369 F. Supp. 1359 (D.D.C. 1973), an interlocutory decision denying summary judgment. No final judgment was ever entered, and the decision was never appealed to the United States Court of Appeals for the District of Columbia Circuit. Indeed, since the case was settled, the United States could not appeal the interlocutory order denying summary judgment. After the district court dismissed the action on February 17, 1977, in accordance with the settlement, the *Edwardsen* decision retained no precedential value. *Cf. United States* v. *Munsingwear, Inc.,* 340 U.S. 36 (1950). Obviously *Edwardsen* provides no basis for a conflict between courts of appeals on any issue involved in this case. To the best of respondents' knowledge, the United States Court of Appeals for the Ninth Circuit is the only court of appeals to have construed section 4(a) and 4(c) of the Settlement Act.

Even if the *Edwardsen* decision had been affirmed by the Court of Appeals for the District of Columbia Circuit, there still would be no conflict of any substance between that court and the court below. The court in *Edwardsen* refused to construe section 4(c)

of the Settlement Act as extinguishing all aboriginal trespass claims primarily, if not exclusively, on the ground that such claims "are vested property rights protected by the Fifth Amendment." 369 F. Supp. at 1379.[15] The court below, however, held only that the Settlement Act in fact did extinguish accrued trespass claims and expressly declined to decide "whether or not any Fifth Amendment compensation is required at all for the Native properties and interests taken and extinguished by the United States." United States Petition at 17a. Thus there is no conflict between the *Edwardsen* court and the court below on the Fifth Amendment issue discussed in *Edwardsen* and, therefore, no necessary conflict on the proper interpretation of section 4(c) of the Settlement Act.

CONCLUSION

Petitioners have failed to demonstrate that this case presents any substantial question of federal law of sufficient importance to warrant this Court's attention. The decision of the court below is not in conflict with any decision of any other court of appeals. The petitions for a writ of certiorari should, therefore, be denied.

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[15] *Edwardsen* was decided prior to this Court's decision in the Regional Rail Reorganization Act Cases, *supra*, and the defendants (who were federal officials) never suggested to the *Edwardsen* court that the constitutional issue might be avoided because of the availability of a Court of Claims action. Indeed the *Edwardsen* decision was made in the context of an almost total absence of briefing and argument on the constitutional issue.

Respectfully submitted,

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July 2, 1980

APPENDIX

APPENDIX A

List of Parties

United States of America

Inupiat Community of the Arctic Slope

Atlantic Richfield Company

Alaska Airlines, Inc.

Alaska Barge & Transport, Inc.

Alaska General Construction Company

Alaska Geophysical, Inc.

Alyeska Pipeline Service Company

Amerada Hess Corporation

Arco Pipe Line Co.

Arctic Marine Freighters

ATCO Housing, d/b/a ATCO Structures, Inc.

The Atlantic Refining Company

Atwood Enterprises, Inc.

State of Alaska

Battelle Pacific Northwest Laboratories

Better Concrete Products Corporation

Boatel Alaska, Inc.

Borst & Giddens Oil Well, d/b/a Logging Service, Inc.

BP Alaska Exploration, Inc.

BP Alaska, Inc.

BP Pipelines, Inc.

Brinkerhoff Drilling Company, Inc.

British American Oil Producing Company

BP Oil Corporation

Burgess Construction Company

Burns International Security Services, Inc.

Cities Service Oil Company

Coastal Drilling Company

Cochran-Dean Co.

Colorado Oil and Gas Corporation

Conoco, Inc.

Core Laboratories, Inc.

C. R. Lewis, Inc.

Continental Laboratories, Inc.

Digicon Alaska, Inc.

Dowell Division of Dow Chemical Company

Dresser Industries, Inc. Petroleum & Minerals Group, Oilfield Products Division, Alaska

Dye Construction, Inc.

Earthmovers of Fairbanks, Inc.

Eastman Oil Well Survey Company

ERA Helicopters, Inc.

Evergreen Helicopters of Alaska, Inc.

Exploration Logging of U.S.A.

Exxon Co. U.S.A.

Exxon Pipeline Company

Forest Oil Corporation

Fricks Flying Service

Frontier Rock & Sand, Inc.

General Construction Company

Geophysical Service, Inc.

Globe Construction Company

Globe Universal Sciences, Inc.

Goodyear Tire & Rubber Company

Gulf Oil Corporation

Halliburton Company

Hamilton Brothers Oil Company

Hewitt Lounsbury & Associates

Home Petroleum Corporation

Home Pipe Line Company

Hunt Oil Company

Home Oil Company of Canada

Homer Freight, d/b/a Homer Transfer Company, Inc.

Humble Oil & Refining Corp.

Interior Airways, Inc.

J & J Equipment, Inc. of Alaska

J & J Excavating, Inc.

James A. Dalton & Assoc.

Kaiser Steel Corporation

Lindsay & Associates

Locher Construction Company, d/b/a Locher Company, Inc.

Loffland Brothers Company

Lorac Service Corporation

Madrel, d/b/a Ray Geophysical

McCulloch Oil Corporation

Marathon Oil Company

Merric, Inc.

Michael Baker, Jr., Inc.

Mobil Oil Corporation

Mobil Pipe Line Company

R. B. Montgomery Drilling, Inc.

Mukluk Freight Lines, Inc.

Nabors Alaska Drilling, Inc.

Mullen Corporation

National Geophysical Company Inc.

National Mechanical Contractors, Inc.

Newmont Oil Company

Niedermeyer-Martin Co.

North State Telephone Co., Inc.

Northern Transportation Co.

Occidental Petroleum Corporation

Oilfield Service, Inc.

Olympic, Inc.

Pacific Inland Navigation Company

Pan Alaska Airways (LTD)

Pan American Petroleum Corporation

Parker Drilling Company

Peter Bowden Drilling Services, Ltd.

Phillips Petroleum Corporation

Pipeline Technologists, Inc.

Placid Oil Company

Polar Oil Field Services, Inc.

Polaris Drilling Company

Prudhoe Bay Communications, Inc.

Puget Sound Tug & Barge Company

Ramstad Construction Co.

Reading & Bates Offshore Drilling Company

Reading & Bates Oil and Gas Co.

Red Dodge Aviation, Inc.

Richfield Oil Corporation

Rivers C. & M. Co.

Rowan Drilling Company, d/b/a Rowan Drilling U.S.

S & G Construction, Inc.

S. S. Mullens, Inc., d/b/a S. S. Mullen Construction Co.

Schlumberger, Ltd.

Sea Airmotive, Inc.

Shell Oil Company

Shellabarger Flying Service

Sinclair Oil Corporation

Sinclair Oil Corp. of New York

Sourdough Freight Lines, Inc.

Socony Mobil Company, Inc.

Sohio Petroleum Company

Sperry-Sun Wells Surveying Company

Spruce Equipment Company

Standard Oil Company of California

Stutzmann Engineering Associates

Sun Oil Company

The Superior Oil Company

Teledyne Exploration Company

Teledyne Industries, Inc.

Texaco, Inc.

Trans Arctic, Inc.

Union Oil Company of California

United Geophysical Corporation

Universal Services, Inc.

Wagley, Inc.

Westeco Systems, Inc.

Western Geophysical Company of America

Western Offshore Drilling and Exploration Company (WODECO)

Whipstock Alaska

Wien Air Alaska, Inc.

Winship Air Service

Woodward-Lundgren Associates

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

Nos. 79-1739 and 79-1743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

INUPIAT COMMUNITY OF THE ARCTIC SLOPE,
Petitioner,
v.
ATLANTIC RICHFIELD CO., ET AL.

UNITED STATES OF AMERICA,
Petitioner,
v.
ATLANTIC RICHFIELD CO., ET AL.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF FOR PETITIONER INUPIAT COMMUNITY OF THE ARCTIC SLOPE

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July 10, 1980

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REPLY BRIEF FOR PETITIONER INUPIAT COMMUNITY OF THE ARCTIC SLOPE

The Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, was intended to settle many, but not all, of

the claims of Alaskan Natives. In particular, Congress intended to avoid taking any constitutionally protected rights, and therefore deliberately excluded from extinguishment under the Act the Natives' accrued causes of action for trespass. As discussed in detail in the petition for certiorari filed by the Inupiat Community of the Arctic Slope, both the language of the Act and its legislative history confirm this view.

Respondent oil companies argue that the court of appeals was correct in holding that the Settlement Act took the Natives' accrued causes of action for trespass, even if the result is to transfer liability for the trespasses to the United States. This holding, if allowed to stand, subjects the United States to precisely the lengthy litigation and indeterminate liability that Congress wished to avoid. See Petition for Certiorari in No. 79-1739, pp. 15-21. Compare *United States* v. *Sioux Nation of Indians*, No. 79-639 decided June 30, 1980.

The trespasses committed by respondents were not innocent missteps. The vast bulk of the trespasses occurred after protests by the Natives and the United States Bureau of Indian Affairs that intrusions were trespassory, after the Secretary of Interior instituted a land freeze because title to the land was in question, and after the United States Court of Appeals for the Ninth Circuit held, in *Alaska* v. *Udall*, 420 F.2d 938 (9th Cir. 1969), *certiorari denied*, 397 U.S. 1076 (1970), that State selections could be barred by proof of Native use and occupancy. Even the leases issued by the State on tentatively approved land were "without warranty", recognizing the doubtful nature of the State's title. See Petition for Certiorari in No. 79-1739, pp. 4-7. In the face of all of the warnings and protests, the oil companies made a very deliberate choice to continue their intrusions, intrusions that, needless to say, have been extremely profitable to them.

The Inupiat Community of the Arctic Slope shares the view of the United States that liability for the damages caused by the oil companies' trespasses properly rests with the actual trespassers. The court of appeals, in holding to the contrary, has rewritten the Alaska Native Claims Settlement Act into a form never contemplated by Congress. This Court should grant the petitions for writs of certiorari to determine the meaning and intent of the Alaska Native Claims Settlement Act.

Respectfully submitted,

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see 79

1743